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Criminal Law

Mark M. Dobson*

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Criminal Law: 1996 Survey of Florida Law

Mark M. Dobson*

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I. INTRODUCTION

Florida courts continue to decide numerous cases in the area of substantive criminal law. Keeping up with the recent pronouncements of Florida's courts in this area obviously presents a challenge to the busy practitioner. This article discusses Supreme Court of Florida decisions in the area of substantive criminal law handed down between July 1, 1995 and

* Professor of Law, Nova Southeastern University, Shepard Broad Law Center, Fort Lauderdale, Florida; LL.M., Temple University, 1978; J.D., Catholic University, 1973; B.A., Georgetown University.

July 1, 1996.[1] As with past survey articles on criminal law, this one does not discuss issues regarding the death penalty or other sentencing issues. Both these topics have become so specialized that they deserve separate, special treatment. Even after cases mainly involving the death penalty and other sentencing issues[2] are eliminated, the survey does not discuss every Supreme Court of Florida case. Cases which merely discuss the application of settled or fairly standard fact situations to a well-settled rule of law have also been eliminated.[3] When a particular area of substantive criminal law is discussed in the text of this article, cases from the Florida district courts of appeal discussing the same area are mentioned in the footnotes accompanying that section to help supplement the textual discussion. Otherwise, Florida district court opinions are not the subject of this article. Similarly, new legislation is mentioned only when it relates to the continuing importance of a discussed case.

This article is divided into two main parts. The first part discusses the Supreme Court of Florida cases concerning major questions of substantive criminal law that do not involve constitutional issues. The second part discusses Supreme Court of Florida cases involving constitutional challenges to substantive criminal law statutes in Florida.

II. NON-CONSTITUTIONAL DECISIONS

A. *Kidnapping*

This past year the Supreme Court of Florida decided an important case clarifying once again what constitutes the offense of kidnapping in Florida. Section 787.01(1)(a) of the *Florida Statutes* defines the basic

1. The author has chosen as a cut-off point decisions reported up to, and including 673 So. 2d. Thus, as in last year's article, some major Supreme Court of Florida cases decided before July 1, 1996 may not be included in this article. Major Supreme Court of Florida cases decided before July 1, 1995, but not included in last year's survey, are discussed in this year's article.

2. Indeed, cases discussing sentencing guidelines and related topics were a major focus of a significant number of Supreme Court of Florida cases this last survey year. Readers interested in these areas should consult the recent supreme court decisions referenced in APPENDIX A to this article.

3. Thus, a number of Supreme Court of Florida decisions involving homicide offenses are not discussed in this article. Readers interested in supreme court cases discussing whether the state has proven a particular homicide offense may wish to consult the opinions in APPENDIX B to this article.

offense of kidnapping.[4] This section provides that either "confining, abducting, or imprisoning another person against his will and without lawful authority"[5] by any of three specified means is kidnapping when the act was done to further or to accomplish a specific purpose. The three specified means are "forcibly, secretly, or by threat."[6]

Kidnapping is a specific intent crime.[7] There are four different specific purposes for kidnapping under section 787.01(a):[8] 1) kidnapping for ransom, reward, or as a shield or hostage;[9] 2) kidnapping in connection with

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4. The remaining two subsections of section 787.01 set forth the sentencing provisions and establish an additional offense when a young child (under 13) is kidnapped with aggravating circumstances.

5. *See* FLA. STAT. § 787.01(1)(a) (1995). One recent Supreme Court of Florida opinion implies that the confinement, abduction, or imprisonment must be at least partially successful for there to be a kidnapping. *See* Rogers v. State, 660 So. 2d 237 (Fla. 1995) (reversing the kidnapping conviction of a driver whom the defendant ordered at gunpoint to drive in a certain direction). In Rogers, the court held that since the driver refused and drove in a different direction, there was insufficient evidence to support a kidnapping conviction. *Id.* at 241. As kidnapping is a specific intent crime, one would think that attempted kidnapping would be a possible lesser included offense here. However, for reasons not stated, the court's opinion does not discuss this.

6. *Id.* Chapter 787 provides no definition of these specified means. Arguably, the term "forcibly" means by actual use of physical force, while the term "by threat" means by threatened use of either physical force or some other harm. Otherwise, the terms would be redundant.

"Secretly" has been defined as "intended . . . to isolate or insulate the intended victim from meaningful contact or communication with the public." *See* Robinson v. State, 462 So. 2d 471, 476 (Fla. 1st Dist. Ct. App. 1984), *review denied*, 471 So. 2d 44 (Fla. 1985) (citing Miller v. State, 233 So. 2d 448 (Fla. 1st Dist. Ct. App. 1970)). *See also* McCarter v. State, 463 So. 2d 546 (Fla. 5th Dist. Ct. App.), *review denied*, 472 So. 2d 1181 (Fla. 1985). For example, the *Robinson* court found that the defendant's act of asking a sexual assault victim whether she needed a ride and then driving to a secluded area without the victim being aware of what was happening or where she was being taken constituted a secret abduction.

7. *See* Heddleson v. State, 512 So. 2d 957 (Fla. 4th Dist. Ct. App. 1987); State v. Graham, 468 So. 2d 270 (Fla. 2d Dist. Ct. App. 1985); Mills v. State, 407 So. 2d 218 (Fla. 3d Dist. Ct. App. 1981).

8. *See* Justus v. State, 438 So. 2d 358, 367 (Fla. 1983), *cert. denied*, 465 U.S. 1052 (1984) (declaring that "the four clauses pertaining to criminal intent [are] set out [in the] disjunctiv[e], so that there are four alternative means by which one can form the intent to commit kidnapping.").

9. FLA. STAT. § 787.01(1)(a)1. This section was discussed in a recent important case decided during this survey period. In Lafleur v. State, 661 So. 2d 346 (Fla. 3d Dist. Ct. App. 1995), the defendant appealed a conviction for the armed kidnapping of his infant son. Lafleur claimed that as he was the boy's father; therefore, he could not be legally convicted of kidnapping his own child. The district court disagreed for two reasons. First, the court noted that another district court opinion, Johnson v. State, 637 So. 2d 3, 4 (Fla. 3d Dist. Ct. App.

another felony;[10] 3) kidnapping to inflict bodily harm or to terrorize;[11] and 4) kidnapping to interfere with a governmental or political function.[12] The most frequently encountered factual scenario involves allegations that the act constituting the kidnapping was done with the intent to satisfy the second of these four possible purposes, i.e., to "[c]ommit or facilitate commission of any felony."[13] Florida courts recognize that there are problems with applying this subsection too literally to other felonies, the elements of which involve some confinement or movement of another person. Indeed, the Supreme Court of Florida, in its first case discussing section 787.01(1)(a)2 after its passage, noted that "[i]f construed literally this subsection would apply to any criminal transaction which inherently involves the unlawful confinement of another person, such as robbery or sexual battery."[14] Thus, any confinement for purposes of these crimes would automatically make the offender liable for kidnapping as well.

States have adopted three basic approaches to deal with this issue: 1) the "any movement or confinement" approach, making *any* movement or confinement of another except those absolutely necessary to commit the other felony kidnapping;[15] 2) the "incidental" approach making only those

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1994), *review denied*, 649 So. 2d 235 (Fla. 1994) which announced "[t]he general rule ... that a parent cannot be found guilty of kidnapping ... for taking his child from the other parent" was inapplicable because in *Johnson* there was no court order awarding custody to the parent from whom the child was taken, whereas in *Lafleur* such an order had been made. *Lafleur*, 661 So. 2d at 348. Second, *Johnson* does not control when the child is taken for an ulterior purpose, as opposed to exercising the taking parent's parental rights. *Id.* Lafleur, during the abduction, had initially refused to give the boy up as the boy was "his 'ace in the hole.'" Also, the boy was taken to force his mother to return to Lafleur. This second reason, if taken literally, will become the primary focus of inquiry whenever a parent is accused of kidnapping his or her child. Regardless of whether a custody order exists or not, taking one's child for an unlawful purpose should not be condoned. However, applying this reasoning too literally may result in turning domestic disputes into kidnapping offenses. Where a child is forcibly taken at gunpoint by one parent from another parent, no one will probably feel any qualms in having the parent who used potentially deadly force convicted of kidnapping. But in other scenarios, applying *Lafleur*'s language literally may lead to unwarranted extensions of the kidnapping offense.

10. FLA. STAT. § 787.01(1)(a)2.

11. *Id.* § 787.01(1)(a)3.

12. *Id.* § 787.01(1)(a)4.

13. *Id.* § 787.01(1)(a)2. This subsection has by far the most reported cases discussing kidnapping and seems to be the most common intent charged for kidnapping in Florida.

14. *See* Mobley v. State, 409 So. 2d 1031, 1034 (Fla. 1982).

15. This approach would appear to produce a larger number of convictions than the other two. For a list of cases illustrating this approach, see Comment, *Criminal Law: Lowering the Threshold for Kidnapping to Facilitate a Felony*, 35 U. FLA. L. REV. 528, 529 nn.15–16 (1983).

acts of victim movement or confinement that are materially different from the other felony kidnapping; and 3) the *Model Penal Code* approach making only "[movement] from [the victim's] place of residence or business, or a substantial distance from the vicinity where [the victim] is found"[16] or "unlawfully confin[ing the victim] for a substantial period in a place of isolation"[17] kidnapping.[18]

The Supreme Court of Florida in *Faison v. State*[19] selected the second of these three approaches. *Faison* required that a three-part test be satisfied before an accused could be convicted of kidnapping under section 787.0(1)(a)2. Under this test, the movement or confinement:

> (a) Must not be slight, inconsequential and merely incidental to the other crime;
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> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.[20]

Proof of each factor is necessary for a kidnapping conviction under section 787.01(1)2.[21]

Unfortunately, this test has been easier to state than to apply. Once again during this survey year, the Supreme Court of Florida, in *Berry v. State*,[22] reconciled a split between two district courts of appeal as to whether certain facts support a conviction under section 787.01(1)(a)2 for kidnapping. Berry and some accomplices entered an apartment and robbed two victims at gunpoint. One victim was immediately bound and left in the same

16. MODEL PENAL CODE § 212.1.

17. *Id.*

18. In *Faison*, Justice Boyd forcefully argued for a fourth approach which would make victim movement or confinement during another felony kidnapping only when such acts "expose the victim to a risk of physical or mental harm substantially greater than the risk of harm ordinarily encountered by the victim of the forcible felony being committed...." *Faison*, 426 So. 2d at 968 (Boyd, J., concurring in part and dissenting in part). For a discussion praising this approach and urging its adoption, see Matthew J. King, Note, *Kidnapping in Florida: Don't Move or You've Done It*, 13 STETSON L. REV. 197, 205–08; 211–14 (1985).

19. 426 So. 2d 963 (Fla. 1983).

20. *Id.* at 965.

21. Kirtsey v. State, 511 So. 2d 744, 745 (Fla. 5th Dist. Ct. App. 1987) (discussing FLA. STAT. § 787.01(1)2).

22. 668 So. 2d 967 (Fla. 1996).

room where he was when the robbers entered. The robbers forced the other victim to accompany them to each room and show them where any valuables may be located. Afterwards, this victim was tied hand and foot before the robbers left. Unfortunately for the robbers, he freed himself shortly after their departure and called the police. At trial, Berry was convicted of both armed robbery and kidnapping. The Fourth District Court of Appeal affirmed his kidnapping conviction finding that the act of tying up a victim by itself could support a kidnapping under *Faison*.[23] The supreme court granted review to resolve an apparent conflict between this decision and the first district's opinion in another case.[24]

The supreme court first noted that tying someone up clearly constituted a "confinement" under section 787.01(1) and that under the facts, such confinement was also clearly not willful.[25] Likewise, the court noted that the defendant's actions constituting the alleged kidnapping were done to commit or facilitate commission of a felony, in this case robbery.[26] Therefore, taken literally, the elements of section 787.01(1)(a) had all been proven. However, because of the purpose for which the alleged acts of kidnapping were taken, the *Faison* test needed to be applied to see if Berry could be found guilty of this offense.

Applying *Faison*, the supreme court easily concluded that tying up the victims satisfied the first *Faison* requirement that the confinement[27] "not be slight, inconsequential and merely incidental to the other crime."[28] The court noted that if the victims had been held at gunpoint until the robbery was completed, this would be a confinement, but that the court would have found it incidental to the robbery's commission. Likewise, if the robbers had made the victims go from room to room and later merely left them in a room with orders to stay there until the robbers had left, this would also be incidental. The court noted that "[i]n both hypotheticals, any confinement accompanying the robbery would cease naturally with the robbery."[29] Here,

23. Berry v. State, 652 So. 2d 836, 839 (Fla. 4th Dist. Ct. App. 1994).

24. *See* Brinson v. State, 483 So. 2d 13 (Fla. 1st Dist. Ct. App.), *review denied*, 492 So. 2d 1335 (1986).

25. *Berry*, 668 So. 2d at 969.

26. *Id.*

27. In *Berry*, the court noted that the *Faison* test should be read in the disjunctive as applying to either confinement or movement. Here, the supreme court focused on the defendant's actions in tying up the victims and thus only discussed "confinement." *Berry*, 652 So. 2d at 838.

28. *Faison*, 426 So. 2d at 965.

29. *Berry*, 668 So. 2d at 969.

however, the robbers clearly intended the confinement to continue after the robbery was over.[30]

Faison's second requirement that the confinement "not be of the kind inherent in the nature of the other crime"[31] was also easily satisfied. Tying someone up is not needed to commit a robbery. Indeed, the victims could have been left untied and a robbery would have still occurred.

Finally, *Berry* concluded that *Faison's* third requirement was also met. The court concluded that tying the victims up "was a confinement with independent significance from the underlying felony in that it substantially reduced the risk of detection."[32] Indeed, the court could find no other purpose for leaving the victims bound other than to limit the risk of being caught. The fact that one victim shortly afterwards untied himself and frustrated this purpose made no difference as attainment of the confinement's objectives was irrelevant; what mattered was the intended purpose behind them.[33]

Berry demonstrates that questions about the proper application of *Faison* will continue to arise in the Florida courts. The court attributes some of the difficulty in applying *Faison* to both the failure to distinguish between "confinement" and "movement" and the failure to recognize *Faison* used these terms disjunctively rather than conjunctively. However, *Berry* can-

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30. Despite the robbers' goal in tying up the victims, one of them was able to free himself almost immediately and call the police. The supreme court discusses this fact with reference to *Faison's* third requirement but not with the first requirement. *Id.* at 970.

The court's language could bring about very different results depending on the words the robbers use. Under the court's test, if the robbers put victims in a room and tell them not to come out until the robbers leave, the confinement would be inconsequential. But what if the robbers tell the victims not to leave until ten or twenty minutes have passed? The victims would still not be bound as in the first scenario but they would be confined longer than needed for the robbery to be completed if they comply with the robbers' commands. Under this second scenario, would the robbers additionally be guilty of kidnapping?

This question, and others that could be posed about differences in the court's examples, show that under *Faison*, as with probably any test designed to be applied to a myriad of fact situations, questions about the test's proper application will continue to persist.

31. *Faison*, 426 So. 2d at 965.

32. *Berry*, 668 So. 2d at 970.

33. See *supra* note 30 and accompanying text. The *Berry* opinion does not discuss what possible effect on the first *Faison* requirement one victim's being able to free himself quickly had. The court's discussion of the first *Faison* requirement speaks in terms of actual continued confinement beyond a robbery's completion. If this is really what the court intends is needed to satisfy this requirement then why didn't the escape of one victim frustrate that here? Was the state perhaps lucky in that there was a second victim who was not freed until later? Does that mean Berry actually committed only one kidnapping and not two?

didly acknowledges that "the diverse factual situations to which [*Faison*] must be applied"[34] means that the complete elimination of questions under this test is not likely to occur.[35] In *Berry*, the supreme court discussed how *Faison* should be applied to a particular situation. The trial and district courts now have one more useful opinion to serve as guidance in applying the law of kidnapping in Florida.

B. *Felon in Possession of Weapons*

Under section 790.23(1) of the *Florida Statutes*, persons convicted of a felony under the law of any state or country are prohibited from possessing or controlling firearms or other electric weapons including tear gas guns and chemical weapons.[36] Violation of this section is a second degree felony.[37]

The status of the accused as a convicted felon must be proven as an element of this charge.[38] The Florida district courts of appeal have been split as to whether the pendency of an appeal renders one a "convicted" felon within the meaning of section 790.23. During this last survey year, the Supreme Court of Florida handed down two short, but important, opinions dealing with this question.

The first case, *State v. Snyder*,[39] directly addressed the split between the appellate districts over when someone should be considered a "convicted" felon for purposes of section 790.23.[40] Snyder had been convicted and sentenced for grand theft.[41] During the pendency of his appeal from this

34. *Berry*, 668 So. 2d at 970.

35. *See supra* notes 30 & 33 (providing further questions which the author believes *Berry* leaves unanswered).

36. This includes juveniles adjudicated for an offense that would be considered a felony if the juvenile was an adult. FLA. STAT. § 790.23(1)(c) (1995). Proof of the possession element needed to sustain a conviction under this section may be based on the uncontroverted testimony of a single witness. *See* Cordero v. State, 669 So. 2d 1075 (Fla. 3d Dist. Ct. App.), *review denied*, 678 So. 2d 337 (Fla. 1996).

37. FLA. STAT. § 790.23(3).

38. *See* Killingsworth v. State, 584 So. 2d 647 (Fla. 1st Dist. Ct. App. 1991).

39. 673 So. 2d 9 (Fla. 1996).

40. *Snyder* dealt with former section 790.23. *See* FLA. STAT. § 790.23 (1991). Since Snyder's conviction the legislature has amended this section. Unlike present section 790.23(1), the former version of this statute did not apply to juveniles adjudicated of what would have been felonies had the proceedings taken place in an adult court.

41. Snyder was a minor but was convicted and sentenced as an adult. At the time of his later charge, if Snyder had merely been adjudicated a delinquent, section 790.23(1) could not have been used to support a felon in possession of a firearm charge. *See* J.B.M. v. State, 560 So. 2d 347 (Fla. 5th Dist. Ct. App. 1990). Section 790.23 has been amended to include juvenile adjudications as predicate offenses. *See* FLA. STAT. § 790.23(1)(a).

conviction, he was arrested for firing a rifle in his backyard. Shortly after his arrest, the second district affirmed his treatment as an adult for the grand theft conviction, but remanded due to other errors in sentencing.[42] Subsequently, Snyder was tried and convicted of possession of a firearm by a convicted felon. Snyder appealed claiming that he had not been "convicted" for purposes of section 790.23 at the time he had possessed the rifle since his appeal was still pending.

The second district reluctantly agreed but noted the direct conflict with cases from other districts. The supreme court framed the issue before it as "whether a defendant is 'convicted' for purposes of section 790.23 . . . when adjudicated guilty in the trial court, notwithstanding [the existence of an appeal or other procedure to challenge the conviction]."[43] The court noted that the one district court[44] which answered this question affirmatively did so for two distinct reasons: the presumption of the correctness of verdicts and the irrelevancy of a pending appeal or other post conviction procedures to the legislative policy behind section 790.23. The supreme court in *Snyder* focused on the second of these reasons to uphold the conviction in this case.

The court found that this criminal offense provision was "intended to protect the public by preventing the possession of firearms by persons who, because of their past conduct, have demonstrated their unfitness to be entrusted with such dangerous instrumentalities."[45] Whether an appeal or other procedure challenging a felon's conviction is pending was found irrelevant to this legislative policy.[46] An adjudication of guilt, even if later found to be incorrect for whatever reason, thus serves as a kind of prima facie indication of dangerousness, indicating the person adjudicated is presumptively unfit as a matter of law to carry dangerous items.[47] Thus, the

42. Snyder v. State, 597 So. 2d 384 (Fla. 2d Dist. Ct. App. 1992).

43. *Snyder*, 673 So. 2d at 10 (footnote omitted).

44. Burkett v. State, 518 So. 2d 1363 (Fla. 1st Dist. Ct. App. 1988).

45. *Snyder*, 673 So. 2d at 10 (citing Nelson v. State, 195 So. 2d 853, 855 & n.8 (Fla. 1967)).

46. Indeed, *Snyder* declared that "[t]he legislature never intended for convicted felons to posses firearms during the pendency of their appeals." *Id.* at 11.

47. This presumption or assumption behind section 790.23 is obviously not universally true in fact for all cases. Clearly the commission of all kinds of felonies are not in actuality a true indication of dangerousness. A person who commits a grand theft by stealthy means is certainly a lot less dangerous than one who commits a robbery or an aggravated battery. The latter two kinds of felonies involve some element of violence or intimidation while the former does not. Indeed, if grand theft is accomplished by force against a person, it should become a robbery.

court held that "a defendant is 'convicted,' for purposes of [section 790.23,] when he is adjudicated guilty in the trial court, notwithstanding the fact that he has the right to contest the validity of the conviction by appeal or by other procedures."[48]

Snyder's holding is clearly correct for several reasons. One, it certainly seems to help promote the legislative policy behind section 790.23. Appeals and other challenges to the validity of convictions take at least months, if not years, to exhaust. Should a convicted felon be allowed to posses a firearm during this time? If the conviction is affirmed, the defendant has received an undeserved grace period during which firearm possession would be allowed. Second, a contrary decision in *Snyder* would only raise additional questions about when a person should be considered a "convicted" felon under section 790.23. For example, what if the conviction is affirmed by a district court but the defendant tries either successfully or unsuccessfully to convince the supreme court to review it? How about the time when habeas corpus or other post-conviction relief challenges can still be filed, could a defendant still possess firearms during this time? In this situation, line-drawing is inevitable. Thus, the most logical place to draw the line would be where it most effectuates legislative and other policies. This is clearly at the trial court level. After *Snyder*, all persons who are accused and adjudicated as felons have clear notice they cannot possess, at least until something happens to officially undermine the validity of their convictions, the items specified in section 790.23.[49] Finally, although the supreme court did not

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However, section 790.23 makes no distinctions between the kinds of felonies or how they were factually committed. Anyone convicted of a felony, no matter how non-dangerous that person may actually be, is considered *legally* too dangerous to possess the kinds of items noted in section 790.23.

48. *Burkett*, 518 So. 2d at 1366 (footnote omitted).

49. Notice is clearly an important concept in the criminal law. However, all persons are presumed to know the law and conduct themselves so as not to violate it. Therefore, a convicted felon should not be able to plead ignorance of the law as a defense, nor should convicted felons be able to plead ignorance of their predicate felonies as a defense. *See* Burkett v. State, 518 So. 2d 1363, 1364 (Fla. 1st Dist. Ct. App. 1988).

However, at least one decision from another state has allowed an accused's ignorance of his underlying felony to serve as a defense to this type of charge. In People v. Bray, 124 Cal. Rptr. 913 (Cal. Ct. App. 1975), the accused had made multiple attempts to ascertain if his out-of-state conviction was a felony. Even the prosecuting attorney admitted to having had difficulty in finding out this fact. The appellate court under these circumstances found that Bray's conviction should be reversed. To this writer, *Bray* is an example of where the sound exercise of prosecutorial judgment in not filing charges to begin with should have been followed.

discuss this as a reason behind its decision, the holding in *Snyder* promotes the principle of verdict finality. Even though a result may later be overturned on appeal, we should treat a verdict as final unless or until it is otherwise unreasonable to do so.[50]

Snyder also addressed the issue of what should happen to a defendant convicted under section 790.23 during the pendency of an appeal from the conviction of a predicate felony which is subsequently reversed. If the court chose to strictly follow the public policy behind section 790.23, one result would be to say that the subsequent reversal has no effect on the conviction under section 790.23. However, this result also appears inherently unfair. What if the appellate reversal came one day after the adjudication of guilt under section 790.23, should the conviction still stand? The supreme court in *Snyder* decided that "fairness requires that [a defendant] be permitted to attack a conviction for possession of a firearm when the predicate felony conviction is subsequently reversed on appeal."[51] Thus, the court held that "such a defendant is entitled to relief through a Florida Rule of Criminal Procedure 3.850 motion to vacate judgment."[52]

In its second decision discussing section 790.23 during this survey period, the Supreme Court of Florida in *State v. Johnson*[53] followed *Snyder's* reasoning to approve a lower court decision vacating the defendant's conviction for felony possession of a firearm under section 790.23. Johnson had first been convicted of a felony battery and had appealed this conviction. During the appeal's pendency, he was arrested for possession of a firearm and charged under section 790.23. Johnson plead nolo contendere to this charge but moved to set it aside when the appellate court later reversed his battery conviction. The trial court denied the motion. However, the district

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Ironically in *Snyder*, the notion that people should know the law worked to the defendant's benefit. Since the controlling law in the second district would have allowed Snyder to continue legally possessing firearms at the time he fired the rifle, the supreme court found that he was entitled to rely on it. Thus, applying the supreme court's decision to his case to uphold his conviction would be analogous to convicting him under an ex post facto law. The supreme court therefore approved the reversal of Snyder's conviction although it disapproved the second district's reasoning for it.

50. *Snyder's* holding is consistent with the principle of verdict finality found in other substantive law areas. For example, under section 90.610(2) of the *Florida Statutes*, the pendency of an appeal does not make an otherwise admissible conviction inadmissible for impeachment purposes.

51. *Snyder*, 673 So. 2d at 11.

52. *Id. See also* FLA. R. CRIM. P. 3.850(a) (providing the appropriate method for filing such a motion).

53. 668 So. 2d 194 (Fla. 1996). *Johnson* and *Snyder* were actually decided on the same day.

court of appeals found Johnson was entitled to post-conviction relief based on the same reasoning the supreme court used in *Snyder*.[54] The Supreme Court of Florida affirmed the granting of such relief and the vacating of Johnson's conviction for possessing a firearm while a convicted felon.

Snyder and *Johnson* will most likely somewhat increase the number of convictions being vacated on post-conviction relief, as well as possibly increasing the number of rule 3.850 motions filed. However, the combined result of the decisions in these two cases help bring certainty and fairness to the law.

C. *Tampering With Evidence*

Under section 918.13 of the *Florida Statutes*, it is a third degree felony[55] to tamper with or fabricate physical evidence under certain situations. There are several elements which must be proven before a conviction under this section appears possible. First, a "criminal trial or proceeding or an investigation"[56] must be in existence or about to be initiated. Second, this must have been begun by a lawful authority.[57] Third, the accused must know about the existence of the first two elements. Fourth, the accused must "[a]lter, destroy, conceal or remove"[58] some physical object. Finally, this must be done "with the purpose to impair its . . . [use] in [the particular] proceeding or investigation."[59]

The Supreme Court of Florida in *State v. Jennings*[60] recently discussed how this statute can be violated. In this case, the defense filed a motion to dismiss to the State's charge that Jennings tampered with physical evidence. The defense alleged that police officers approached Jennings after seeing him holding what they believed was marijuana. As one officer approached Jennings, the officer also believed Jennings was holding cocaine rocks in his hand. This officer shouted "police" and Jennings either simultaneously or immediately afterwards tossed the suspected cocaine into his mouth. The officers grabbed Jennings and eventually arrested him. However, Jennings had swallowed the objects tossed into his mouth, and these were never

54. Johnson v. State, 664 So. 2d 986, 987–88 (Fla. 4th Dist. Ct. App. 1995).
55. FLA. STAT. § 918.13(2) (1995).
56. *Id.* § 918.13(1).
57. The specific authorities listed in section 918.13(1) are a "prosecuting authority, law enforcement agency, grand jury or [state] legislative committee." *Id.*
58. *Id.* § 918.13(1)(a).
59. *Id.*
60. 666 So. 2d 131 (Fla. 1995).

recovered. Since the State did not file a traverse, the alleged facts were assumed to be true for purposes of ruling on the motion.

The trial court granted the motion finding as a matter of law, that swallowing the suspected cocaine rocks could not constitute the needed act of "conceal[ment], remov[al], [destruction or alteration]."[61] The third district affirmed, but on a different basis.[62] That court concluded that Jennings could not be guilty of the charged offense since he "was neither under arrest nor did he know that a law enforcement officer was about to instigate an investigation."[63] The supreme court granted review to resolve a certified conflict split between this district courts on this issue.[64]

The supreme court first addressed the trial court's ruling that, as a matter of law, swallowing an object[65] could not constitute the needed destruction or concealment for a conviction. The trial court had relied on *Boice v. State*[66] for this conclusion. In *Boice*, undercover police sold the defendant a bag of cocaine. Immediately after this, uniformed officers surrounded Boice's car. Boice threw the bag out of his car, but officers retrieved it from the roadway. The bag and cocaine had not been altered in any way. The second district found that since the bag had been tossed into the open roadway and not otherwise concealed in any manner, there had been no alteration or concealment under the statute. Rather, the district

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61. FLA. STAT. § 918.13(1)(a).

62. State v. Jennings, 647 So. 2d 294 (Fla. 3d Dist. Ct. App. 1994).

63. *Id.* at 295. The district court distinguished this case from other cases where the defendant had been placed under arrest before swallowing the object involved. *See* McKinney v. State, 640 So. 2d 1183 (Fla. 2d Dist. Ct. App. 1994); McKenzie v. State, 632 So. 2d 276 (Fla. 4th Dist. Ct. App. 1994). Under this scenario, the district court would either have found Jennings guilty of tampering with evidence if the swallowed object was not recovered and attempted tampering if it was recovered. For a post-*Jennings* case finding the accused not guilty of tampering with evidence and citing *McKinney*, as authority, see State v. Gilmore, 658 So. 2d 629 (Fla. 2d Dist. Ct. App. 1995), where an accused who was confronted by officers for the purpose of arresting him placed a bag of marijuana in his mouth but later spit it out on the officer's demand and was found not guilty of tampering with evidence. The court found that "[a]t most, such conduct may be attempted tampering." *Id.* However, the court did not rule as such for unexplained reasons.

64. The district court and the supreme court found that there was conflict between the third district's opinion and the fourth district's decision in Hayes v. State, 634 So. 2d 1153 (Fla. 4th Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994).

65. The supreme court noted that it made no difference what Jennings had swallowed, as long as all the elements were satisfied, since section 918.13(1)(a) pertained to "any record, document, or thing." Thus, as long as a physical object of some sort is involved, section 918.13 forbids its tampering or alteration under the circumstances specified.

66. 560 So. 2d 1383 (Fla. 2d Dist. Ct. App. 1990).

court characterized this as "merely abandon[ing] the evidence,"[67] which would not violate section 918.13.[68] In *Jennings*, the Supreme Court of Florida rejected the district court's interpretation of *Boice* as too broad.[69] The supreme court found that depending on the circumstances,[70] "tossing evidence away in the presence of a law enforcement officer ... could amount to tampering or concealing evidence."[71]

The supreme court then turned to the district court's ruling that under the facts Jennings could not have known an investigation of the object was about to occur. The supreme court agreed with the district court's conclusion that Jennings was not under arrest when he swallowed the suspected rocks. However, that did not mean he could not possess the requisite

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67. *Id.* at 1384.

68. *Boice* felt that a contrary decision could lead to scenarios that the legislature did not intend. The court gave as an example a teenager, who when confronted by police for illegally drinking beer, throws the beer can from his car. *Boice* noted that if this was concealment under section 918.13, the teenager could be guilty of a third degree felony when the suspected crime initiating the act of concealment was merely a misdemeanor.

69. Thus, the supreme court did not disapprove *Boice*, but merely limited its holding to the specific situation involved.

70. The court unfortunately did not explain what these circumstances were. However, *Jennings* cites, with apparent approval, Hayes v. State, 634 So. 2d 1153 (Fla. 4th Dist. Ct. App.), *review denied*, 645 So. 2d 452 (Fla. 1994), wherein the district court found that throwing a bag of suspected rock cocaine into a drain while being chased by a law enforcement officer was tampering with evidence.

If the supreme court intended *Hayes* to serve as an example of when tossing something away in an officer's presence can be tampering or concealing evidence, then courts will have to distinguish between acts of merely discarding an object and acts of discarding an object in such a way that it cannot likely be retrieved and used against the person getting rid of it.

For a recent case from another state finding that merely abandoning narcotics while being pursued by a law enforcement officer is not sufficient to support a conviction for tampering with evidence, see Commonwealth v. Delgado, 679 A.2d 223 (Pa. 1996). The Pennsylvania statute in question in this case is substantially similar to section 918.13 of the *Florida Statutes*.

71. *Jennings*, 666 So. 2d at 133. The court cited with approval both *McKinney* and *McKenzie*, two cases also cited with approval by the district court. Since the supreme court reversed the district court's decision, readers of these two opinions may be initially confused with how both courts could cite the same two cases with approval. However, the cases were cited by these two courts *when discussing different issues*. The supreme court cited them to refute the trial court's reasoning, not the district court's.

Readers should also note that the supreme court did not find that the act of swallowing potential evidence will always be concealment, merely that it sometimes could be. The trial court had ruled, pursuant to its ruling on the motion to dismiss (which could only be granted if these facts were insufficient as a matter of law), that such an act could never constitute concealment.

knowledge. Jennings had swallowed the objects as soon as the word "police" had been shouted. Again, viewing this fact from the standard of whether reasonable people could find Jennings knew of the impending police investigation, the supreme court found reasonable minds could differ and thus found that granting a motion to dismiss on this point was inappropriate.

Jennings is clearly an important decision from a law enforcement standpoint. Section 918.13 was passed to protect the integrity of criminal proceedings by preventing destruction or alteration of evidence relevant to them. Swallowing drugs is one of the easiest ways to avoid their seizure by police. If such an act could not constitute destruction or concealment, then suspects could possibly avoid prosecution both under section 918.13 and drug offense statutes by simply tossing the suspected items into their mouths and gulping them down before the police could stop this.[72] Surely, the legislature would not want such absurd results along with the obvious frustration of law enforcement efforts. Likewise, people may know that they will be the subject of an investigation prior to being formally under arrest. The supreme court was clearly correct in deciding that both questions posed by *Jennings* should be determined on a case by case basis according to the facts and not as an absolute matter of law in either situation.

D. *Burglary*

Burglary, at common law, was the breaking and entering of the dwelling house of another in the nighttime in order to commit a felony therein. Modern burglary statutes have significantly broadened this definition.[73]

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72. Alternatively, following the trial court's ruling would possibly lead to more situations where police would wrestle with or choke suspects to avoid having them swallow evidence. This could lead to more injuries to the police and suspects alike.

Of course, police could also wait until the suspect defecates or alternatively have the suspect's stomach forcibly pumped. One assumes that few officers would have the incentive to go to such lengths.

Readers who believe such scenarios never occur should remember Rochin v. California, 342 U.S. 165 (1952), where police officers broke into a suspect's bedroom and then choked Rochin in an effort to prevent him from swallowing two capsules that he had tossed into his mouth. When the police were unsuccessful in these efforts to obtain the potential evidence, they handcuffed Rochin and took him to a hospital where his stomach was pumped to force him to vomit up the items. Although these efforts were successful, the Supreme Court suppressed the evidence because the police actions were so extreme that they violated Due Process.

73. Section 810.02(1) of the *Florida Statutes* defines "burglary" as "entering or remaining in a dwelling, a structure, or a conveyance with the intent to commit an offense therein,

Florida's definition of burglary has been expanded beyond the common law to protect structures and conveyances as well as dwellings.[74] Similarly, the intruder need not have the intent to commit a felony; the intent to commit any criminal offense would do. The burglary chapter's definitions of "structures"[75] and "dwellings"[76] also include the "curtilage"[77] of these two places. However, the term "curtilage" is not specifically defined in chapter 810 or elsewhere in the *Florida Statutes*.[78] Florida courts have previously

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unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain." FLA. STAT. § 810.02(1) (1995).

Under this definition, non-consent to the entry or remaining in the dwelling is not an element of the offense. Rather, consent is an affirmative defense which the accused must raise. *See* Strachn v. State, 661 So. 2d 1255 (Fla. 3d Dist. Ct. App. 1995). Ordinarily, a person would ordinarily be incapable of burglarizing his own home. However, this may not always be the case. Recently, in a case of apparent first impression, the Second District Court of Appeal found that a husband who violated a court restraining order by entering his former home to commit a crime inside could be legally found guilty of burglary, since at the time of entry he "did not have a possessory right in the premises." State v. Suarez-Mesa, 662 So. 2d 735, 736 (Fla. 2d Dist. Ct. App. 1995), *review denied*, 669 So. 2d 252 (Fla. 1996).

For a recent case discussing the "entering" element of burglary, see Braswell v. State, 671 So. 2d 228 (Fla. 1st Dist. Ct. App.), *review denied*, No. 88,012, 1996 LEXIS 1588, at *1 (Fla. Aug. 26, 1996) (finding that the accused entered a conveyance by reaching into the open bed of a pickup truck and taking personal property from it).

For recent cases discussing the sufficiency of evidence to support burglary convictions, see Persaud v. State, 659 So. 2d 1191 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 667 So. 2d 775 (Fla. 1996) (finding that when the defendant was stopped in his car filled with stolen property from a dwelling, shortly after a citizen had reported what looked like a possible break-in, this could support a burglary of a dwelling conviction) and Walker v. State, 656 So. 2d 950 (Fla. 5th Dist. Ct. App. 1995) (finding that a defendant could be convicted of burglary based on the finding of his fingerprint on the window of a back bedroom that was used as the point of illegal entry).

74. FLA. STAT. § 810.02(1).

75. *See id.* § 810.011(1). This section begins its definition by describing a "[s]tructure" as "a building of any kind . . . ." Similar language is used at the start of the definition of "[d]welling." *See id.* § 810.011(2).

The word "building" is not defined in chapter 810. Recently, the fourth district in Dozier v. State, 662 So. 2d 382, 383 (Fla. 4th Dist. Ct. App. 1995), found no error in a trial court's instruction to jurors in a burglury trial that for the purpose of defining structure, "there's no special legal definition for building, so you should take building to mean what is normally associated with the term in your every day life."

76. *See* FLA. STAT. § 810.011(2).

77. Both subsections (1) and (2) of section 810.011 contain the language "together with the 'curtilage' thereof" in their definitions of structure and dwelling. FLA. STAT. § 810.011(1)–(2). However, not all statutory definitions of burglary include "curtilage." *See* MODEL PENAL CODE § 221.1(1).

78. Whether certain conduct takes place within the "curtilage" of a dwelling is also relevant to charges of disorderly conduct under section 877.03 of the *Florida Statutes*. *See* Miller

interpreted the term "curtilage" to include a structure's enclosed grounds,[79] fenced-in yard,[80] enclosed parking area,[81] garage,[82] and driveway.[83] Under the current definition of "curtilage," some past Florida decisions have even held that merely walking up to the door of someone's house with the intent to break in and commit a crime will be a burglary even if the house's threshold is not crossed, since the "curtilage" has been entered.[84] Recently, the Supreme Court of Florida settled any question concerning what basic requirements there are before a particular area can be considered a structure or a dwelling's "curtilage."

In *State v. Hamilton*,[85] Hamilton and an accomplice, Thomas, entered the yard of a home intending to steal motors from a boat located in the yard. The homeowner saw the two would-be thieves and confronted them with a shotgun. Subsequently, the homeowner shot and killed Thomas. Hamilton was charged with one count of burglary of a dwelling and a second count of second degree felony murder for the death of his accomplice, Thomas. At trial, the prosecution presented very little evidence concerning the appearance of the backyard where the motors were located.[86] Hamilton requested that the trial court give the definition of structure that is found in the *Florida Standard Jury Instructions in Criminal Cases*. Under that definition, a "structure" is "any building of any kind, either temporary or permanent, that has a roof over it, and the enclosed space of ground and outbuildings immediately surrounding that structure."[87] Despite this request, the trial court gave a modified instruction that omitted any requirement that the area beyond the building itself be "enclosed" and which defined "curtilage" as

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v. State, 667 So. 2d 325 (Fla. 1st Dist. Ct. App. 1995) (reversing the defendant's conviction for disorderly conduct based on his loud cursing in his yard as this occurred in his dwelling and no facts showed that the language used incited others or posed an imminent danger to them).

79. *See* Tobler v. State, 371 So. 2d 1043 (Fla. 1st Dist. Ct. App.), *cert. denied*, 376 So. 2d 76 (Fla. 1979).

80. *See* T.J.T. v. State, 460 So. 2d 508 (Fla. 3d Dist. Ct. App. 1984).

81. *See* Greer v. State, 354 So. 2d 952 (Fla. 3d Dist. Ct. App. 1978).

82. *See* State v. Rolle, 577 So. 2d 997 (Fla. 4th Dist. Ct. App. 1991).

83. *See* J.E.S. v. State, 453 So. 2d 168 (Fla. 1st Dist. Ct. App. 1984); Joyner v. State, 303 So. 2d 60 (Fla. 1st Dist. Ct. App. 1974), *cert. discharged by* 325 So. 2d 404 (Fla. 1976).

84. *See* M.M. v. State, 610 So. 2d 55 (Fla. 3d Dist. Ct. App. 1992).

85. 660 So. 2d 1038 (Fla. 1995).

86. The State only presented a photograph showing the place as a "'semi-secluded area adjacent to the home surrounded by several unevenly spaced trees.'" *Id.* at 1039 n.2 (quoting State v. Hamilton, 645 So. 2d 555, 557 (Fla. 2d Dist. Ct. App. 1994)). Other than this, there was no evidence that the backyard was enclosed in any matter.

87. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 136 (1981).

"the ground and buildings immediately surrounding a structure and dwelling and customarily used in connection with it."[88] Following these instructions, the jury found Hamilton guilty of burglary of a dwelling and second degree felony murder.

The Second District Court of Appeal[89] found the trial court committed reversible error by deviating from the standard jury instruction on "structure" by not including in its instructions the requirement that the "curtilage" be enclosed.[90] The court, however, declined to decide to what extent the area around a structure must be enclosed before it could be considered to meet the meaning of "curtilage." Although it reversed Hamilton's convictions for burglary and for second degree felony murder,[91] the district court certified both of these issues to the Supreme Court of Florida as questions of great public importance.

The Supreme Court of Florida accepted the certified questions and affirmed the decision of the second district.[92] In so doing, the *Hamilton*

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88. *Hamilton*, 660 So. 2d at 1039. Both the supreme court and the district court noted that this definition was based on virtually identical language as that found in A.E.R. v. State, 464 So. 2d 152, 153 (Fla. 2d Dist. Ct. App.), *review denied*, 472 So. 2d 1180 (Fla.), *cert. denied*, 474 U.S. 1011 (1985) (footnote omitted).

89. *Hamilton*, 645 So. 2d at 556.

90. Both the district court and the supreme court also found that the trial court should have explained on the record why the standard instruction was not given. The State had requested the deviation from the standard language, evidently to cure problems with the deficiency of proof that the yard was within the "curtilage." As the district court noted, the State's prosecution rested solely on the jury finding that the killing took place during the commission of a burglary. Without such a finding there would not be any statutorily required predicate felony for application of the felony murder doctrine. Although Hamilton was convicted of third degree grand theft, this is not one of the specifically enumerated felonies under section 782.04 of the *Florida Statutes*, which can support a felony murder conviction. *See* FLA. STAT. § 782.04 (1995).

The instruction that the trial court gave was based on the language of another district court opinion. Thus, the trial court had some basis for its deviation from the standard instruction. However, this ultimately turned out to be incorrect. Prosecutors and trial judges should carefully note the second district's admonition in this case that "[p]assages from appellate opinions, taken out of context, do not always make for good jury instructions." *Hamilton*, 645 So. 2d at 559 n.5 (quoting Sarduy v. State, 540 So. 2d 203, 205 (Fla. 3d Dist. Ct. App. 1989)).

91. The district court also reduced Hamilton's conviction for grand theft from a second degree to a third degree felony. Additionally, the district court rejected claims that Hamilton's motion for judgment for acquittal should have been granted and that the trial court erred by not instructing the jury on justifiable and excusable homicide. The district court's opinion does not give any reasons for these rulings.

92. The exact question both certified and accepted is "DOES FLORIDA'S BURGLARY STATUTE REQUIRE THAT THE 'CURTILAGE' BE ENCLOSED AND, IF SO, TO WHAT EXTENT?" *Hamilton*, 660 So. 2d at 1039.

opinion provides an organized and thoughtful discussion of the gradual evolution of burglary law in Florida. Florida's original statutory definition of burglary was extremely close to the common law definition.[93] This original definition protected mainly dwellings. Any other "building or structure"[94] was only included within the scope of this original definition if they were "within the 'curtilage' of a dwelling house though not forming a part thereof."[95] However, this definition was repealed in 1974, and burglary, as an offense, was expanded to apply to all roofed buildings of any kind. The current definitions of structure and dwellings both explicitly contain language making the "curtilage" part of these places. Thus, the present Florida burglary statute extends protection not only to buildings, but also potentially to the grounds around them.[96] As the *Hamilton* court succinctly noted, "[t]he legislature has [therefore] redefined the crime of burglary as it was treated at common law, but has utilized the common law term 'curtilage' to expand the reach of the burglary statute beyond buildings and vehicles."[97] Thus, deciding whether a particular locale now comes within the definition of "curtilage" is of extreme importance for determining potential criminal liability.

Hamilton began its exploration of what should be considered as the present appropriate definition of "curtilage" by discussing the earlier meanings given to this term. The court noted that at common law, the cluster of buildings and the surrounding ground near the dwelling home would usually be enclosed in some fashion. At common law, use of the word "curtilage" with reference to burglary was a way of protecting not only the dwelling itself but also the buildings and areas so intimately associated with the dwelling that they were virtually a part of it. The court found that early treatises and dictionary definitions generally required some sort of

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As the second district's opinion recognized, this actually is two questions, not one. The second district found that beyond requiring that the "curtilage" be enclosed it was hard "to be more precise given the myriad arrangements an owner can fashion in enclosing...." *Hamilton*, 645 So. 2d at 561. The second district thus left the second question unanswered. Similarly, the supreme court failed to expressly address this second question. Like so many other factual issues, this second question is likely to be gradually answered on a case-by-case basis, rather than in one sweeping decision.

93. *See* 1895 Fla. Laws ch. 4405 (later codified at FLA. STAT. § 810.01 (1941)).

94. *Id.*

95. *Id.*

96. The burglary statutes also protect conveyances, but the term "curtilage" is not used in the definition of "conveyance." Thus, there is presently no such concept as a "curtilage of a conveyance" for purposes of burglary in Florida.

97. *Hamilton*, 660 So. 2d at 1041.

enclosure in order for a place to be considered part of a dwelling's "curtilage." *Hamilton* concluded that the term "curtilage" had a rather precise definition at common law.

The supreme court noted that Florida has expressly incorporated the common law into its own body of law.[98] Despite this incorporation, Florida courts have been inconsistent in defining what constitutes a "curtilage." *Hamilton* mainly attributed this inconsistency to the different factual and legal contexts in which the term "curtilage" is used. The court noted that most district court opinions had construed the term "curtilage" for purposes of the burglary statute as requiring some sort of enclosure. However, the same courts have used a different definition when examining the term "curtilage" for purposes of deciding whether an illegal search and seizure has taken place. In *United States v. Dunn*,[99] the United States Supreme Court adopted a four-part test for determining whether a certain location was a part of a building's "curtilage" when trying to determine if an illegal search occurred. Whether the area was enclosed within the same immediate area as a home was only one part of that test.[100] Under the *Florida Constitution*, Florida courts are required to interpret the *Florida Constitution*'s prohibition against unreasonable search and seizures[101] in conformity with the decisions in the United States Supreme Court construing the Fourth Amendment. In *Hamilton*, the Supreme Court of Florida found no inconsistency in using different tests for determining whether a place was within the "curtilage" depending upon the legal issue involved.

In addition to noting that Florida's criminal law had expressly incorporated the common law, *Hamilton* also found that other basic principles involving construction of criminal statutes required that the "curtilage," for purposes of burglary statutes, must mean an enclosed area. First, there is the principle that citizens must be given ample notice as to which aspect of their conduct will violate the criminal law. Although ignorance of the law is generally no defense, a certain amount of notice must be given or else there will be due process problems.[102] Second, Florida statutory criminal law

98. *See* FLA. STAT. § 775.01 (1995).

99. 480 U.S. 294 (1987).

100. The other three parts of the test were: (1) the proximity of the area alleged to be "curtilage" to the dwelling; (2) the nature and use to which this area was put; and (3) the steps taken to protect the area from observation by passersby. *Id.* at 301.

101. *See* FLA. CONST. art. I, § 12.

102. Lack of adequate notice brings up questions of vagueness. *See infra* text accompanying notes 121–54 (discussing additional constitutional issues surrounding potentially vague criminal statutes).

expressly provides that criminal statutes should be strictly construed in a fashion "most favorabl[e] to the accused."[103] Since the supreme court could not determine whether the legislature intended to adopt the common law definition of "curtilage" or to eliminate the requirement of enclosure, as some jurisdictions had, fairness required the current burglary statute to be interpreted to contain such a requirement. Finally, the supreme court agreed with the district court's reasoning that to not require some sort of enclosure could possibly lead to harsh and absurd results.

Hamilton is clearly an important case on construction of the Florida burglary statute. As a result of *Hamilton*, the Supreme Court of Florida has provided a somewhat more precise definition for the concept of "curtilage."[104] However, in so doing, the court expressly acknowledged that the legislature could amend the burglary statutes and give the term "curtilage" any definition that it believed to be appropriate.[105] This could include eliminating the requirement of an enclosure for certain areas, as had been done in other jurisdictions. So far, the legislature has not so acted. The real question facing the legislature is whether it wishes to use the burglary statute as a means of expanding criminal responsibility and punishment for offenders who otherwise are breaking the criminal law. *Hamilton's* facts provide a classic example of this scenario. Presently, Hamilton could only be successfully prosecuted for theft.[106] If the burglary statute is amended to expand the definition of "curtilage" to include areas close to a dwelling or structure but not necessarily enclosed, then the two perpetrators would be guilty of burglary as well. Certainly, if one believes in the deterrent theory behind criminal law, expanding the definition of "curtilage" to make Hamilton's act a burglary in addition to maybe a trespass[107] and theft is not troubling. Theoretically, people would then know that entering another's

103. FLA. STAT. § 775.021(1) (1995).

104. As previously noted, the supreme court only answered one of two questions certified by the district court. *See supra* note 92.

105. The legislature has recently amended the definition of "dwelling" to include any "attached porch" on a building or conveyance that would otherwise qualify as a "dwelling." *See* ch. 96-388, § 47, 1996 Fla. Laws 2301, 2337 (amending FLA. STAT. § 810.011(2) (effective October 1, 1996)). However, so far the legislature has not statutorily defined what should be considered as "curtilage."

106. Hamilton could probably not be successfully prosecuted for trespass, under section 810.09(1) of the *Florida Statutes*, unless the homeowner had given the two would-be thieves actual notice to get off of his property. See FLA. STAT. § 810.09(1) (1995). Even if such notice had been given here, the trespass would be only a first degree misdemeanor under the facts given. *See id.* § 810.09(2)(b).

107. *See id.*

property might make them susceptible to harsher punishment. However, the critical issue behind expanding the definition of "curtilage" for purposes of the burglary statute is really posed by the felony murder rule. When the death of someone occurs during certain enumerated felonies, then the surviving felons are liable for first degree murder under the theory of felony murder. Unlike some other jurisdictions, which have adopted different means of abrogating the harshness of the felony murder doctrine, Florida has adopted a relatively strict and harsh interpretation of this doctrine.[108] Thus, the fact that the killing in this particular case was not done by one of the felons, or that the person killed was a co-felon,[109] would not make a difference in applying the felony murder doctrine to Hamilton. Whether the Florida Legislature wishes to achieve such a result should be one of the prime concerns in considering whether "curtilage" should be legislatively defined to abrogate the result reached in *Hamilton*.[110]

E. *Attempted Murder of a Law Enforcement Officer*

Florida criminal law punishes attempted as well as completed crimes. The rationale for so doing that a person who possesses the requisite intent to

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108. The Florida Legislature could have adopted an even harsher version of the felony murder rule. Florida currently applies the felony murder rule only to a certain number of specifically enumerated felonies. The harshest version of the felony murder doctrine would be to apply it to all statutory felonies.

The felony murder rule's harshness may also be alleviated by applying the independent act doctrine. Generally, felons are responsible for all killings committed by their accomplices during the course of the underlying felony. However, when a co-felon's homicidal act so deviates from the original plan and does not further the commission of the felony, it will not be attributed to the other co-felons. Obviously whether such a deviation exists must be determined under the particular facts of each case. For a recent case discussing this doctrine, see Dell v. State, 661 So. 2d 1305 (Fla. 3d Dist. Ct. App. 1995), which found no error in the trial court's refusal to instruct the jury about the independent act doctrine and discussed situations where such an instruction would be appropriate.

109. *See* People v. Washington, 402 P.2d 130 (1965) (reversing defendant's conviction for felony murder where his accomplice was killed by the victim during a robbery).

110. The Supreme Court Committee on Standard Jury Instructions in Criminal Cases has proposed the following new definition for "[d]welling" in section 810.02: "'Dwelling'" means a building [or] [conveyance] of any kind, either temporary or permanent, mobile or immobile, which has a roof over it and is designed to be occupied by people lodging therein at night, together with enclosed space of ground and outbuildings immediately surrounding it." *Proposed Standard Jury Instruction Amendments*, FLA. BAR NEWS, Aug. 1, 1996, at 14.

There is no indication in the published version of the new instruction that it was proposed in response to *Hamilton*. If this is indeed the reason, one would also expect a new instruction for "structure."

commit a criminal act and takes some steps toward the completion of this criminal act poses a sufficient threat to society for the criminal law to intervene. Generally, attempted crimes are punished to a lesser degree than completed crimes.[111] There are two justifications for such difference in punishment. First, since the criminal object was not actually obtained, generally punishing an attempted crime to the same extent as a completed crime would pose problems of disproportionality. Second, and perhaps more important, punishing attempts to a lesser degree than the completed offense provides an incentive for a perpetrator to abandon his or her criminal scheme before attaining its completion.

During this past year, the Supreme Court of Florida, in *State v. Iacovone*,[112] addressed challenges to the former sentencing schemes for the offense of attempted murder of a law enforcement officer. Iacovone became involved in a violent domestic dispute with his former girlfriend who also happened to be the mother of their three children. When a police officer tried to intervene, Iacovone tried to flee in his car. During his escape attempt, Iacovone struck the officer with the car. Iacovone was subsequently tried and convicted of several offenses,[113] including attempted third degree murder of a law enforcement officer. Under the general statutory provisions for third degree murder and for attempt crimes, third degree murder would have been considered a second degree felony[114] and would be punished as a third degree felony.[115] However, since the attempted murder here involved a crime against a police officer, special statutory sections regarding punishment applied. Former sections 775.0823, 775.0825, and 784.07 of the *Florida Statutes* attempted to provide increased protection to Florida law

111. Section 777.04(4)(d) of the *Florida Statutes* lists several exceptions to this principle. FLA. STAT. § 777.04(4)(d) (1995). Where an attempted crime is punished to the same degree as the completed offense, the attempted crime is not considered a lesser included offense of the completed crime. In such a situation, it is error to instruct a jury on both the completed offense and the attempted offense. *See* Nurse v. State, 658 So. 2d 1074 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 667 So. 2d 775 (Fla. 1996) (finding that the trial court committed reversible error by instructing the jury on attempted burglary of a dwelling as well as burglary of a dwelling, both of which were punishable as third degree felonies under the facts). *Nurse* contains an excellent, extensive discussion on what are necessary lesser included and permissive included offenses under current Florida criminal law.

112. 660 So. 2d 1371 (Fla. 1995).

113. The other offenses were burglary, criminal mischief, aggravated assault, and aggravated battery. None of these offense convictions are pertinent to the issue discussed in the appellate decision in this case.

114. *See* FLA. STAT. § 782.04 (1991).

115. *See id.* § 777.04(4)(c) (1991).

enforcement officers and other law enforcement officers acting within the course of their duties by providing increased penalties for certain offenses committed against them. The obvious purpose of these sections is to deter the commission of such offenses against law enforcement officers.

In his appeal, Iacovone challenged the constitutionality and rationality of these former sentencing provisions. Under former section 775.0823(3), a person convicted of third degree murder of a law enforcement officer would have received a sentence of fifteen years with a fifteen year mandatory minimum. However, former section 784.07(3) contained a special sentencing provision for attempted murder of law enforcement officers. This section made all attempted murders of law enforcement officers life felonies. Additionally, former section 775.0825 made anyone convicted of the attempted murder of a law enforcement officer ineligible for parole until twenty-five years incarceration have been served. If read literally, an accused would actually receive less punishment for the completed third degree murder of a law enforcement officer than for an attempted murder. Iacovone claimed that the special offense classification and sentencing provisions of former sections 784.07(3) and 775.0825 violate the Equal Protection Clause.

The Second District Court of Appeal[116] recognized the legislature's general power to fix the offense classifications and to determine the punishment for these offenses. Additionally, the court acknowledged the general rule that "[s]tatutes are presumed to be constitutional."[117] However, in this case, these two principles were insufficient to uphold the constitutionality of the sections involved. The district court noted that traditional equal protection analysis did not apply here,[118] but found that "irrational [offense and sentencing] classifications may violate fundamental constitutional principles . . . ."[119] Protecting law enforcement officers in the performance of their duties was certainly a valid legislative goal. However, punishing some attempted murders of law enforcement officers more harshly than completed murders of the same personnel did not further that goal. Indeed, such a punishment scheme would actually be inconsistent with the furtherance of that goal. Thus, the second district found that the statutory sections would

116. Iacovone v. State, 639 So. 2d 1108 (Fla. 2d Dist. Ct. App. 1994).

117. *Id.* at 1109 (citing State v. Wilson, 464 So. 2d 667 (Fla. 2d Dist. Ct. App. 1985)).

118. The court reasoned that this was because people charged with an attempted murder and those charged with a completed murder are "not similarly situated because they are charged with different offenses." *Id.*

119. *Id.*

be unconstitutional as applied due to the irrational results that they would cause.

Although the Supreme Court of Florida arrived at the same ultimate conclusion as the district court, it did so for different reasons. The supreme court avoided reaching the constitutional issue addressed below. Instead, the court relied on standard principles of statutory construction. Two such principles are that courts must construe statutes to effectuate the legislative intent behind their passage. However, statutes should not be read literally, if doing so would lead to results conflicting with their purpose. Here, the court found that "[t]he legislature unquestionably intends to give law enforcement officers the greatest possible protection."[120] This object would not be attained by applying former sections 784.07(3) and 775.0825 to all degrees of murder.[121] If applied to all degrees of murder, a would-be killer would actually be sometimes better off as far as punishment if his victim was killed rather than if the victim survived. As the court noted, this "would seem to encourage, not discourage, lethal attacks."[122] However, if these sections were applied only to first degree murder, then their application would be rational because the penalty for an attempted first degree murder of a law enforcement would still be less than that for the completed act although both would be enhanced. Thus, the court held that former "sections 784.07(3) and 775.0825 apply only to first-degree murder."[123]

The long range effect of the supreme court's holding in *Iacovone* is not likely to be significant. The legislature has already repealed both former sections 784.07(3) and 775.0825. Penalties for violent crimes against law enforcement officers are still enhanced under sections 775.0823 and 784.07. All degrees of both attempted and completed murders of law enforcement officers are now punished under the Florida sentencing guidelines, with the exception of first degree murder. However, the significance of the court's reasoning in *Iacovone* should apply to all offense classification and punishment. Both the district and supreme court opinions require rationality in criminal statutes. When such rationality does not exist on the face of a statute, the statute will either be construed in a way such that rationality can be provided or it will be declared invalid. Indeed, literally applying these former sections would have been inconsistent with the general principles behind punishment. One goal of punishment is deterrence. The theory

120. State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995).
121. *Id.*
122. *Id.*
123. *Id.* at 1374.

behind this is that the potentially higher the punishment the less incentive there is to commit the forbidden act. Here, as both courts recognized, literal application of these sections would actually have provided a disincentive to desist, rather than an incentive to desist. Another theory behind punishment is retribution. However, one principle of retribution is proportionality. Under this principle, commonly stated as "let the punishment fit the crime," vastly disproportionate sentences for virtually the same acts should not exist, and when they do so, such disproportionality must be strictly justified. As no such justification existed for the sections in question in *Iacovone*, the supreme court really had no choice but to either find them unconstitutional or construe them in a way to avoid reaching a disproportionate and absurd result.

III. CONSTITUTIONAL CHALLENGES TO FLORIDA CRIMINAL LAWS

A. *Vagueness*

Due process challenges to Florida criminal statutes based upon allegedly vague language continue to concern the Supreme Court of Florida. Criminal statutes must give a reasonable person sufficient notice of what conduct is likely to be proscribed for a number of reasons. First, the criminal law expects that every citizen will conform his or her conduct so as to avoid violating the law. Without knowing exactly what conduct violates the law, reasonable people cannot possibly be expected to govern their actions accordingly. Second, vague statutes allow the police undue freedom to interpret what actions violate the law. This potentially allows the police to arrest, search, and charge citizens in an inconsistent and potentially discriminatory manner. Third, if the statute is so vague that the conduct which violates it is unclear, citizens can find themselves being charged at the whim of a prosecutor. Fourth, citizens fearing potential imposition of criminal sanctions may forego the valid exercise of their constitutional rights rather than risk arrest and/or conviction. Finally, without sufficient standards as to what conduct violates a statute, jury decision making as to when individuals are guilty of violating the criminal law is not likely to be sufficiently consistent to merit public confidence. Thus, unconstitutionally vague statutes are general risks to the rights of individual citizens and to the confidence of the general public in the criminal justice system. Individual

Supreme Court of Florida cases addressing challenges to Florida criminal statutes based on vagueness are discussed below. [124]

1. Negligent Treatment of Children

In *State v. Mincey*,[125] the Supreme Court of Florida considered arguments that Florida Statute section 827.05 concerning negligent treatment of children was unconstitutionally void for vagueness. The state charged Mincey under the negligent treatment statute after his five-year-old stepson was found wandering the streets late at night clad only in pajamas. This charge was based purely on simple negligent conduct. Mincey moved to dismiss the charges claiming that section 827.05 was unconstitutionally vague. The county court agreed and certified its decision to the Fourth District Court of Appeal, which likewise found section 827.05 constitutionally deficient.[126] However, the Supreme Court of Florida accepted the

124. In addition to the recent Supreme Court of Florida cases discussing the void for vagueness doctrine, a number of district court of appeal decisions dealt with this topic. During the last two survey periods, vagueness was the most frequently raised basis for constitutional challenges to Florida criminal laws. The relatively large number of cases raising vagueness challenges suggest that this will continue to be the one of the most, if not the most, popular grounds on which to attack criminal statutes. For further general discussion on the void for vagueness doctrine, see LAFAVE & SCOTT, CRIMINAL LAW 2.3 (2d ed. 1986).

For district court of appeal decisions during this survey period raising vagueness challenges to Florida Statutes, see Morey's Lounge, Inc. v. State of Florida, Dept. of Business and Professional, Division of Alcoholic Beverages and Tobacco, 673 So. 2d 538, 540 (Fla. 4th Dist. Ct. App.), *review denied*, No, 88,240, 1996 LEXIS 1723, at *1 (Fla. Sept. 18, 1996) (upholding the constitutionality of section 561.29(1)(a) which allows the Department to suspend or revoke a beverage license for violation of "any of the laws of this or of the United States") (quoting Florida Bar v. Dubow, 636 So. 2d 1287 (Fla. 1994)). *See also* Jennings v. State, 667 So. 2d 442, 444 (Fla. 1st Dist. Ct. App.), *review granted*, 676 So. 2d 1368 (Fla. 1996) (finding that the words "12 A.M." in section 893.13(1)(c) of the *Florida Statutes*, increasing the penalty for selling narcotics near a school during certain hours, were not unconstitutionally vague); Falco v. State, 669 So. 2d 1053, 1054 (Fla. 4th Dist. Ct. App.), *review denied*, 672 So. 2d 542 (Fla. 1996) (finding that the term "custodial authority" in section 794.041(2)(b) of the *Florida Statutes*, criminalizing sexual activity by a person in custodial authority with a child, was not vague); and Quinn v. State, 662 So. 2d 947, 949 (Fla. 5th Dist. Ct. App. 1995) (upholding the constitutionality of section 337.135 of the *Florida Statutes*, under which it is a second degree felony, to "fraudulently represent an entity as a socially and economically disadvantaged business enterprise" to qualify for certification under a Department of Transportation program to assist such businesses in obtaining contracts) (quoting FLA. STAT. § 337.135 (1989)).

125. 672 So. 2d 524 (Fla. 1996).

126. State v. Mincey, 658 So. 2d 597 (Fla. 4th Dist. Ct. App. 1995).

certified question concerning validity of section 827.05[127] from the district court's decision.

Florida Statute section 827.05 makes it a second degree misdemeanor for a person "though financially able" to "negligently deprive a child" of the necessities of life when such deprivation either significantly impairs the child's physical or emotional health or significantly endangers it.[128] This section is not Florida's first attempt to criminalize the negligent treatment of children. Former section 827.05 of the *Florida Statutes* had made it a second degree misdemeanor to "negligently depriv[e] a child of, or allo[w] a child to be deprived of" necessities. However, this statute had not passed constitutional muster. In *State v. Winters*,[129] the supreme court found this language constitutionally deficient because the statutory language evidently punished simple negligent conduct without any showing of willfulness. After *Winters*, the legislature amended section 827.05 to add the words "though financially able" and additional language of causation which would link the alleged deprivation to the danger of harm.[130] Besides former section 827.05, Florida also at the same time had a general child abuse statute, former section 827.042, which made it a crime to "wilfully or by culpable negligence" deprive a child of life's necessities when doing so either caused the child's "physical or mental health . . . to be endangered."[131] The year after *Winters*, in *State v. Joyce*,[132] the defendants attempted to convince the Supreme Court of Florida that the general criminal child abuse statute,

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127. The exact question accepted by the supreme court is as follows:

> WHETHER THE ADDITION OF LANGUAGE ADDRESSING FINANCIAL ABILITY AND A CAUSAL RELATIONSHIP BETWEN THE RESIDENTIAL ENVIRONMENT AND SIGNIFICANT IMPAIRMENT OF THE CHILD'S PHYSICAL AND EMOTIONAL HEALTH IN SECTION 827.05 AMOUNTS TO A WILLFUL INTENT OR SCIENTER REQUIREMENT SUFFICIENT TO OVERCOME THE HOLDING IN *WINTERS*.

Mincey, 672 So. 2d at 525 (footnote omitted).

128. *See* FLA. STAT. § 827.05 (1995).

129. 346 So. 2d 991 (Fla. 1977).

130. The additional causation language in revised section 827.05 which was added to the end of the former statute provides: "when such deprivation . . . causes the child's physical or emotional health to be significantly impaired or to be in danger of being significantly impaired . . . ." FLA. STAT. § 827.05 (1995).

131. FLA. STAT. § 827.04(2) (1975). Section 827.04 has since been amended to prohibit depriving a child of necessities when such deprivation "inflicts or permits the infliction of physical or mental injury to the child." FLA. STAT. § 827.04(2) (1995). Depending upon the degree or duration of the injury, the crime will be either a third degree felony under 827.04(1), or a first degree misdemeanor under 827.04(2).

132. 361 So. 2d 406 (Fla. 1978).

former section 827.04, was unconstitutional for the same reasons that former section 827.05 had been found deficient. However, the supreme court rejected this argument and distinguished the two. *Joyce* noted that the basis for holding former section 827.05 unconstitutional in *Winters* was that "the negligent treatment statute [827.05] made criminal acts of simple negligence—conduct which was neither willful nor culpably negligent."[133] Since former section 827.04(2) had a requirement of willfulness or culpable negligence, the deficiency present in former section 827.05 was not present with the statute in *Joyce*.

In *Mincey*, both the fourth district and the supreme court noted the different results reached on the vagueness challenges in *Winters* and *Joyce*. Both courts also noted that the only difference between former section 827.05 and the present version was the additional statutory language relating to causation and the offender's financial ability. The district court found that the addition of this language did not "address the lack of willfulness, scienter, or mens rea,"[134] and thus did not cure the defect in former section 827.05. The Supreme Court of Florida arrived at the same result, finding that the addition of the new statutory language "does not clarify the type of conduct that is prohibited under the statute."[135] Thus, the *Mincey* court held that the new language did not correct the vagueness problems recognized in earlier decisions and found section 827.05 unconstitutionally vague.

Mincey is an interesting decision because it may have arrived at the right result for the wrong reason. Arguably, section 827.05 does have a mens rea requirement in it. If so, then how could it be considered vague? The statute explicitly contemplates a person who "negligently deprives a child."[136] The type of conduct involved here seems to involve negligence. Certainly the language found constitutional in section 827.04 requiring willfulness explicitly requires a much higher mens rea than negligence.[137]

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133. *Id.* at 407.

134. *Mincey*, 658 So. 2d at 598.

135. *Mincey*, 672 So. 2d at 526.

136. *See* FLA. STAT. § 827.05 (1995).

137. "Willfulness" generally requires an act as opposed to a failure to act. *See, e.g.*, MODEL PENAL CODE § 202(8) (providing that "[a] requirement that an offense be committed wilfully if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."). Under a "negligence" standard, deciding whether a person has acted or failed to act may not be as easy as it seems. For example, did Mincey act negligently by affirmatively allowing his child to wander the streets or did he "act" negligently by not preventing his child from wandering the streets?

The Supreme Court of Florida in *Winters* recognized that negligence can arise from both action or inaction. As the court noted in *Winters*, "[n]egligence may consist either in doing

On the other hand, section 827.04 also criminalizes "culpable negligence" in addition to willfulness.[138] But when one looks at how the Florida courts have defined "culpable negligence,"[139] it is clear that this is the equivalent or virtually the equivalent of what would be considered "recklessly" by some criminal codes.[140]

Mincey and the court's previous decision in *Winters* therefore seem to stand for the simple proposition that statutes which criminalize simple negligent conduct will not pass constitutional muster.[141] Section 827.04 already criminalizes willful child abuse. Thus, persons who willfully harm children can be punished under that statute. The same statutory section also punishes what would be considered "culpable negligence." Those individuals exhibiting a high degree of lack of care for children can likewise be prosecuted. One of the purposes of the criminal law is to clarify what conduct will subject someone to criminal liability. If a statute makes it too easy to subject someone to criminal liability, then there is the problem that

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something that a reasonabl[e] . . . person would not do . . . or in failing to do something that a reasonabl[e] . . . person would do under like circumstances." *Winters*, 346 So. 2d at 993.

138. *See* FLA. STAT. § 827.04(1)–(2).

139. For example, in Hodges v. State, 661 So. 2d 107 (Fla. 3d Dist. Ct. App. 1995), *review denied*, 670 So. 2d 940 (Fla. 1996), the court mentioned that the culpable negligence needed for a manslaughter would have to be "of a gross and flagrant character, evincing reckless disregard of human life . . . or that reckless indifference to the rights of others, *which is equivalent to an intentional violation of them.*" *Id.* at 109 n.2 (emphasis added).

140. The Model Penal Code defines the culpability level of "Recklessly" as "consciously disregard[ing] a substantial and unjustifiable risk . . . ." MODEL PENAL CODE § 2.02(2)(c). The disregard of the risk involved must be "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.*

Under the Model Penal Code, there are four levels of culpability or mens rea that can support a criminal charge depending upon the wording of the statute involved: purposely, knowingly, recklessly, or negligently. *See id.* § 2.02(2). The first three levels of culpability reflect some level of awareness of the conduct the defendant is accused of doing. *Id.* § 2.02(2)(a)–(c). Negligently, the fourth and lowest level of culpability, does not reflect a level of awareness and is only sufficient to support a conviction in rare circumstances. *Id.* § 2.02(d).

141. The only other case during this survey period which discussed section 827.05 also found it unconstitutional. *See* State v. Ayers, 665 So. 2d 296 (Fla. 2d Dist. Ct. App. 1995), *aff'd*, 673 So. 2d 869 (Fla. 1996). However, *Ayers* noted in its opinion that child abuse statutes from several other states that had negligence as one of the levels of culpability had been upheld against vagueness attacks. *Id.* at 298. *Ayers* also noted that at one time certain acts of negligence, such as careless driving, had been punished criminally. *Id.* at 299.

Neither the district court nor the supreme court in *Mincey* make any mention of these other state statutes which appear to prohibit much the same conduct prohibited by section 827.05.

virtually anybody can be held liable.[142] The facts in *Mincey* are a good example. Although one would surely not want to have a five-year-old wandering the streets at night (whether clad only in pajamas or fully dressed), charging somebody with a second degree misdemeanor for one simple act of negligence for allowing such a thing to happen seems a little severe. Many parents, at one time or another, probably do something that negligently expose their child to danger. Luckily, the vast majority of parents hardly ever do this, and luckily most children are not hurt despite being exposed to such dangers. Furthermore, parents who consistently negligently fail to care for their children are subject to state intervention under statutes other than those for criminal offenses. The decisions in *Mincey*, *Winters*, and *Joyce* show that these statutes are probably the appropriate avenue to pursue when parents engage in simple negligence with regards to their children.

2. Bribery

In *Roque v. State*,[143] the Supreme Court of Florida sustained a vagueness challenge to section 838.15 of the *Florida Statutes*, which created the crime of commercial bribe receiving. This statute made it a third degree felony[144] for a person to "solicit[], accept[], or agree[] to accept a benefit with intent to violate a statutory or common-law duty"[145] which that person owes another in a certain capacity.[146] Part of Roque's job as a company credit manager was to extend credit to companies seeking to finance construction equipment. Roque worked with Mr. Smith, an independent contractor, who located suitable candidates for loans from Roque's company. Smith, as an independent contractor, was paid by commission. The state charged Roque with entering into an unauthorized side agreement

142. The language in section 827.05 actually would pose this very problem if construed literally. This section is not limited to parents or those in a caretaking posture towards children. Instead, section 827.05 applies to whoever "is financially able." FLA. STAT. § 827.05 (1995). Thus, one must ask if a millionaire who knows that children are starving and neglects to donate some money to see that the starving children are fed would be prosecutable.

Since the purpose of the criminal statute is to not only specify what acts are prohibited but also to clarify who may be criminally responsible for acting or failing to act under certain circumstances, then arguably section 827.05 could have been declared vague because by making so many persons potentially responsible, it fails to give the notice which due process of law requires.

143. 664 So. 2d 928 (Fla. 1995).

144. FLA. STAT. § 838.15(2) (1995).

145. *Id.* § 838.15(1).

146. *Id.* § 838.15(1)(a)–(e).

whereby Smith kicked back to Roque part of each commission he received for finding a suitable candidate. At the trial court level, Roque successfully moved to dismiss the commercial bribery charges against him, claiming that section 838.15 was unconstitutionally vague and susceptible to arbitrary application. The Third District Court of Appeal disagreed and found section 838.15 to be constitutional.[147] The district court found that there are two separate questions under a vagueness challenge. The first was whether "the statute [in question] gives a person of ordinary intelligence fair notice of what constitutes [the] forbidden conduct."[148] Second, a challenged statute had to be "specific enough that it is not susceptible to arbitrary and discriminatory enforcement."[149] Roque claimed that the inclusion of the words "with intent to violate a statutory or common law duty" made section 838.15 unconstitutionally vague.[150] The district court of appeal rejected this argument for two reasons. This statutory language was found to be specific enough by its reference to the professional or legal relationships specified elsewhere in the statute. The court found that "[a] person who fits into one or more of these categories is certainly aware of the duties which are commensurate with that station."[151] The use of the word "bribe" also helped indicate the nature of the prohibited conduct. When given its common meaning, this word sufficiently conveyed such notice that a person with reasonable intelligence would understand what conduct section 838.15 prohibited. The district court then turned to the second question of the vagueness analysis; whether the statute is susceptible to arbitrary enforcement, and it answered in the negative. Since the word "commercial" modified the words "bribe receiving" in the title of section 838.15 and in its definitional section, the statute by its language only applied to private industry and commercial transactions, not to public officials. Additionally, the court found that the specific professions and relationships enumerated in the statute served to limit the amount of prosecutorial discretion in charging violations of section 838.15.

The district court's opinion had briefly noted the Supreme Court of Florida's previous discussion of the void for vagueness doctrine in its

147. State v. Roque, 640 So. 2d 97 (Fla. 3d Dist. Ct. App. 1994), *review granted*, 650 So. 2d 991 (Fla. 1995).

148. *Id.* at 99 (quoting Brown v. State, 629 So. 2d 841, 842 (Fla. 1994)).

149. *Id.*

150. FLA. STAT. § 838.15(1).

151. *Roque*, 640 So. 2d at 99. *See also* FLA. STAT. § 838.15(1).

relatively recent decision in *Cuda v. State*[152] which contrasted the different results in two other previous decisions. The *Cuda* court found that former section 415.111(5) of the *Florida Statutes*, which made it a third degree felony for anyone to exploit an aged or disabled adult "by the improper or illegal use or management"[153] of such person's property was unconstitutionally vague.[154] In this case, the supreme court had focused on the words "improper" and "illegal" in finding this section unconstitutional. In so doing, the court had contrasted *Cuda* with its decision in two earlier cases, one holding a statute unconstitutionally vague and the other upholding a statute against such a challenge. In *State v. Rodriguez*,[155] the court had upheld former section 409.325(2)(a)[156] of the *Florida Statutes*, which criminalized certain acts regarding food stamps when the acts done were "not authorized by law."[157] *Rodriguez* found that because of the program's peculiar nature and because chapter 409 itself gave notice that there were federal regulations governing the program, these words actually meant "not authorized by state and federal food stamp law."[158] Thus, when the section being challenged was read in conjunction with the remainder of the chapter, constitutional notice problems were satisfied. Contrary to its decision in *Rodriguez*, in *Locklin v. Pridgeon*,[159] the supreme court had struck down a statute containing the exact same language. Former section 839.22 of the *Florida Statutes* made it unlawful for any government officer to "commit any act under color of authority . . . when such act is not authorized by law . . . ."[160] This statute was considered unconstitutionally vague because it required every governmental employee to determine what acts were authorized by law and what acts were not authorized by law. The "law" in *Locklin* was not limited to a narrow area like the "law" in *Rodriguez*. Thus, the term "law" could mean any and all laws, civil or criminal. A person could never know how to govern their conduct to avoid violating the section without

152. 639 So. 2d 22 (Fla. 1994). For extensive discussion about this decision, see Mark M. Dobson, *Criminal Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 67, 104–08 (1995).

153. FLA. STAT. § 415.111(5) (1993).

154. *Cuda*, 639 So. 2d at 25.

155. 365 So. 2d 157 (Fla. 1978).

156. Section 409.325(2)(a) of the *Florida Statutes* contains this challenged statutory language. *See* FLA. STAT. § 409.325(2)(a) (1995).

157. *Rodriguez*, 365 So. 2d at 159.

158. *Id.*

159. 30 So. 2d 102, 103 (Fla. 1947).

160. FLA. STAT. § 839.22 (1945).

having an all-encompassing knowledge of all law—something which was definitely an impossible task. The third district in *Roque* had found that section 838.15 was more like the statute found constitutional in *Rodriguez* than the ones declared invalid in *Cuda* and *Locklin*. Since section 838.18 specifically referred to certain professional relationships that the appropriate statutory and common law applied to, the district court determined this gave sufficient notice of the law which a person must avoid to not violate section 838.15.

When it came time for the Supreme Court of Florida to adjudicate the constitutionality of section 838.15, it was not so generous, nor detailed in its analysis. The supreme court focused on the statutory language "common law duty" in finding section 838.15 unconstitutionally vague. The court felt that few people would be aware that they owed such a "common duty" to their employers and that fewer still could define the duty's dimensions. In order to do so *Roque* found that "substantial legal research would be required by many employees to determine their obligations under the law."[161] Therefore, the statute was unconstitutionally vague. Additionally, the court found that the statute could be susceptible to arbitrary applications. Since section 838.15 prescribed the violation of every statutory or common law duty many acts could be prosecuted, according to the court, "no matter how trivial or obscure, whether it results in harm or not."[162] Thus, individual prosecutors must decide, based on their own subjective opinion, which violations are sufficiently substantial to warrant criminal prosecution. The statute considered in *Roque* therefore failed the second part of the vagueness analysis described in the district court's opinion.

The Supreme Court of Florida's opinion in *Roque* is important for several reasons. First, besides invalidating section 838.15, *Roque* also calls into question the constitutionality of section 838.16, titled "Commercial bribery."[163] Section 838.16 defines the crime of commercial bribery as "knowing that another is subject to a duty described in s. 838.15(1) and with intent to influence the other person to violate that duty . . ."[164] the offender gives that person a benefit. If *Roque* found that a person receiving a commercial bribe could not possibly know which acts "violate a statutory or common-law duty" under section 838.15(1) then logically a person charged

161. *Roque*, 664 So. 2d at 929.
162. *Id.* at 930.
163. *See* FLA. STAT. § 838.16 (1995).
164. *Id.* § 838.16(1).

with making a commercial bribe would not know the same thing.[165] Thus, it is hard to see how section 838.16(1) could be considered constitutional if the language that it refers to was found deficient in *Roque*. *Roque* is also important because it indicates that the Supreme Court of Florida is not disposed to uphold the constitutionality of statutes containing language which criminalizes the violation of certain legal duties when those duties are broadly defined. If it wishes to criminalize conduct similar to that proscribed in sections 838.15 and 838.16 perhaps the best approach that the legislature could undertake is the approach suggested by the decision in *Cuda*. There the court had discussed a similar statute from another state which imposed criminal sanctions for financial exploitation of the elderly that had been upheld against challenges for vagueness. As noted in *Cuda*, the Illinois statute the supreme court cited with approval was quite specific in describing the conduct prohibited. Unfortunately in *Roque*, the supreme court did not give any examples of commercial bribery statutes from other jurisdictions which had been upheld against vagueness attacks. Perhaps, if the legislature could find statutes from other states which contain more specific language than that found in sections 838.15 and 838.16, these would be more likely to be upheld.

B. *Overbreadth*

1. Stalking

Several recently decided Supreme Court of Florida cases considered challenges to criminal statutes on the grounds that they were both vague and overbroad. *Bouters v. State*[166] presented such challenges to the constitutionality of the Florida Stalking Law, which is codified at section 784.048 of the *Florida Statutes*.[167] This section actually contains three separate offenses. Under subsection (2), anyone who "wilfully, maliciously, and repeatedly follows or harasses another person" is guilty of stalking, a first degree misdemeanor.[168] Under subsection (3), any person who does the same things and additionally "makes a credible threat with the intent to place that person [the victim] in reasonable fear of death or bodily injury" is guilty of aggravated stalking, a third degree felony.[169] Finally, under subsection (4),

165. *Id.* § 838.15(1).
166. 659 So. 2d 235 (Fla.), *cert. denied*, 116 S. Ct. 245 (1995).
167. FLA. STAT. § 784.048 (1995).
168. *Id.* § 784.048(2).
169. *Id.* § 748.048(3).

anyone who engages in similar conduct after the person being harassed or followed has attained an injunction against this activity also commits aggravated stalking, again a third degree felony.[170] The terms "harasses," "course of conduct," and "credible threat" are all defined in subsection (1) of the statute.[171]

Bouters had been charged with aggravated stalking under subsection (4) due to a series of alleged acts against his former girlfriend. The former girlfriend filed a complaint with the police alleging that Bouters had been calling her several times daily causing emotional distress and that he had beaten her in the past and threatened to kill her. The girlfriend had obtained a domestic violence injunction against Bouters, but that evidently did no good as the defendant had allegedly entered her home without permission but left when the victim called the police. The victim claimed that she believed that Bouters would have hit her if she had not been on the phone with the sheriff's office and that she was in fear for her safety as well as her life due to his actions against her. At the trial level, Bouters moved to dismiss the charges contending that section 784.048(4) was facially unconstitutional due to vagueness and overbreadth. When that motion was unsuccessful, Bouters pled nolo contendere and then filed an appeal. In a short opinion, the Fifth District Court of Appeal[172] upheld the constitutionality of section 784.048. The Supreme Court of Florida, in a short but important opinion, laid to rest any questions about the constitutionality of this criminal law.

The Supreme Court of Florida turned to United States Supreme Court decisions for the procedure to use in analyzing overbreadth and vagueness challenges to the facial validity of section 748.084. Under the procedure laid down by the United States Supreme Court in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,[173] when such a challenge is brought, a court must first "determine whether the enactment reaches a substantial amount of constitutionally protected conduct."[174] If it does not, then the overbreadth challenge must be rejected. Following this analysis, the reviewing court should examine whether the challenged statute is facially vague. According to the *Village of Hoffman Estates* test, "assuming the enactment implicates

170. *Id.* § 748.048(4).
171. *Id.* § 748.048(1).
172. *See* Bouters v. State, 634 So. 2d 246 (Fla. 5th Dist. Ct. App. 1994).
173. 455 U.S. 489 (1982).
174. *Id.* at 494 (footnote omitted).

no constitutionally protected conduct,"[175] the statute should be declared unconstitutional due to facial vagueness "only if the enactment is impermissibly vague in all of its applications."[176] The Supreme Court of Florida followed this two-step procedure and first examined whether section 784.048 was overbroad due to its interference with either Bouters's own First Amendment rights or the First Amendment rights of others. Bouters contended that under this section an arrest could occur if he engaged in almost any "emotionally charged activity."[177] In his view, as long as the complaining victim and a law enforcement officer both agreed that the activity engaged in served no legitimate purpose and that the person complaining to the police showed substantial emotional distress, someone could be arrested for such constitutionally protected activities, such as political protest or investigative reporting. The Supreme Court of Florida rejected this argument, finding that "[s]talking, whether by word or deed, falls outside the First Amendment's purview."[178] Section 784.048 proscribed a certain type of criminal activity which was particularly described in the statute. This conduct had to be malicious, repeated and designed to cause a reasonable person distress. Furthermore, the supreme court noted that under the definition of "harasses,"[179] the conduct must "serve[] no legitimate purpose" and that under the definition of "course of conduct,"[180] constitutionally-protected activity was explicitly excluded from the statute's coverage. The court recognized that the First Amendment gives a citizen the right to express himself or herself. However, this does not give one the right to engage in conduct which jeopardizes the health and safety of others. In this particular case, the supreme court found that Bouters had indeed allegedly engaged in this type of behavior. Bouters allegedly repeatedly threatened to kill his former girlfriend, and his threats were deemed credible as he had battered her before. Finally, Bouters allegedly violated the domestic violence injunction by entering the victim's home and leaving only when he believed law enforcement authorities would arrive. Thus, the conduct that Bouters engaged in was not constitutionally protected.

The Supreme Court of Florida likewise had no difficulty in rejecting Bouter's claim that section 784.048 was facially vague. To sustain such a

175. *Id.*
176. *Id.*
177. *Bouters*, 659 So. 2d at 237.
178. *Id.*
179. *See* FLA. STAT. § 784.048(1)(a).
180. *See id.* § 784.048(1)(b) (Supp. 1992).

claim, Bouters had to show that "the law [was] impermissibly vague in all its applications"[181] and thus vagueness could occur only if the prohibitions of a statute were not clearly defined. With regard to section 784.048, Bouters claimed the statutory definition of "harasses" was unconstitutionally vague. Under that definition, "harasses" meant "to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose."[182] The defendant claimed that this definition created a subjective standard for "substantial emotional distress" and that someone who was unduly sensitive could suffer such distress from what would be entirely innocent and permissible contact. If this was so, and if the party causing the distress could be criminally charged, then the average citizen could never be sure that any of his or her conduct towards another person could not end up subjecting the citizen to the reach of section 784.048.

The Supreme Court of Florida had no problem rejecting such a claim. According to the court's analysis, the stalking statute was analogous to the criminal assault statute. Under the criminal assault statute, the well-founded fear necessary to be caused by another person was measured by the reasonable person standard rather than a subjective standard. Here the same principle was found to apply to the stalking statute. If the conduct was such that it would cause substantial emotional distress in a reasonable person, then it would violate section 784.048. Conduct causing substantial emotional distress in another person but which would not have caused such in a reasonable person would not come within the purview of section 784.048. Thus, the Supreme Court of Florida rejected both attacks on the stalking law's constitutionality.

2. Cross Burning

Florida's criminal "cross burning" statute also came under constitutional attack under this survey period. Section 876.18 of the *Florida Statutes* makes it a first degree misdemeanor "to place . . . on the property of another . . . a burning or flaming cross or any manner of exhibit in which [such a cross] is a whole or part without first obtaining written permission of the owner or occupier of the premises to do so."[183] In *State v. T.B.D.*,[184] the

181. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982).

182. FLA. STAT. § 784.048(1)(a) (1995).

183. *Id.* § 876.18 (1995).

State charged a minor with erecting a flaming cross on another's property in violation of this section. However, the trial court found that this section was unconstitutional, because it infringed upon protected First Amendment rights. The First District Court of Appeal agreed with the trial court's ruling and held that section 876.18 "criminalizes a substantial amount of expression protected by the First Amendment and is, therefore, overbroad."[185] The district court first found that since the activity prohibited by section 876.18 was undoubtedly a form of expressive conduct, this conduct fell within the purview of the First Amendment's protection. While the district court recognized that the state has more leeway to restrict expressive conduct than merely written or spoken expression, the court noted that the state cannot do so because of the content of the message to be conveyed. Thus, although the message behind placing a flaming cross in another's property was reprehensible, this conduct still implicated protected First Amendment concerns, making section 876.18 subject to particularly close scrutiny. United States Supreme Court decisions have decreed that when conduct and not speech is involved "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[186] Applying this test to section 876.18, the district court concluded that the overbreadth here was both "real" and "substantial." The expressive conduct prohibited here could not be considered limited to "fighting words," words which by their very utterance tend to inflict injury and/or incite an immediate breach of the peace. Although the conduct here and the message it conveyed might be reprehensible, the government was still not free to prohibit such activities merely because of its offensive nature.[187] The district court also concluded that even if section 876.18 could be narrowly construed and was limited only to fighting words, it would still have to be found unconstitutional for several reasons. First, the court found that the section

184. 638 So. 2d 165 (Fla. 1st Dist. Ct. App. 1994), *rev'd on other grounds*, 656 So. 2d 479 (Fla. 1995), *cert. denied*, 116 S. Ct. 1014 (1996).

185. *Id.* at 166.

186. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

187. The district court's opinion gives one example of how the court believed the state could end up using section 876.18 to suppress prosecution conduct, which although offensive, was still protected by the First Amendment. The court posited the situation where the Ku Klux Klan erected a flaming cross on one of its member's property but failed to "first obtain[ ] written permission of the owner." *T.B.D.*, 638 So. 2d at 168 (discussing FLA. STAT. § 876.18).

The owner might have even been happy to see the cross go up and might orally have consented to having it on the property. However, if read and enforced as literally written, such conduct would violate section 876.18 and make those who put up the cross subject to prosecution.

proscribed only one type of conduct based upon the content of the message expressed. Second, such conduct discrimination was not necessary in order to further the legitimate interests which the statute sought to promote.[188] On this basis, the first district upheld the constitutional challenge to section 876.18.

The Supreme Court of Florida, in a relatively short opinion, given the questions involved, disagreed with the district court's analysis and found that section 876.18 passed constitutional muster.[189] The supreme court recognized that under the First Amendment "[c]ontent-based restrictions are presumptively invalid."[190] However, one exception to this general principle is where the speech or conduct was of such slight social value that it is outweighed by "the social interest in order and morality."[191] Three examples of this exception are: 1) defamatory speech; 2) obscenity; and 3) fighting words. The supreme court noted that threats of violence can be regulated because citizens have an interest in being protected by the government from fears of violence. Fighting words are such that "by their very utterance [they] inflict injury or tend to incite an immediate breach of the peace."[192] The court found that section 876.18 was concerned with conduct that came within these "threats of violence."[193] Given the historical background to cross burning in the United States and its relationship to such lawless activity as lynchings, shootings, and other means of persecution, the court easily determined that "[t]he connection between a flaming cross in the yard and forthcoming violence is clear and direct."[194] When such a symbol is placed without authorization on someone's property, it cannot help but to inflict harm by causing the occupant fear. The Supreme Court of Florida noted that United States Supreme Court had recently struck down an ordinance from another state attempting to deal with similar conduct. In *R.A.V. v. City of St. Paul*,[195] a juvenile had been charged with placing a

188. The court specifically stated that the conduct which section 876.18 proscribes could already make one subject to prosecution under a number of other sections of the *Florida Statutes* including section 784.011 (assault); section 877.03 (breach of the peace or disorderly conduct); section 806.13 (criminal mischief); section 823.01 (criminal nuisance); section 877.15 (failure to control or report a dangerous fire); and sections 810.08–.09 (trespassing).

189. State v. T.B.D., 656 So. 2d 479 (Fla. 1995), *cert. denied*, 116 S. Ct. 1014 (1996).

190. *Id.* at 480.

191. *Id.*

192. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

193. *Id.* at 481.

194. *T.B.D.*, 656 So. 2d at 481.

195. 505 U.S. 377 (1992).

burning cross in a neighbor's yard. The City statute there made it a crime to "plac[e] on public or private property a symbol . . . including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender . . . ."[196] The Court found this ordinance invalid because rather than prescribing all sorts of fighting words, the ordinance only prohibited them when they offended due to reasons such as race, color, creed, etc. Therefore, the statute did not provide protection to all citizens from such fighting words but only to exclusive groups, constituting a form of impermissible favoritism to certain subjects while prohibiting others. On the other hand, the Supreme Court of Florida found that section 876.18, protected all citizens who had flaming crosses placed, without authorization, on their property; therefore the law showed no unconstitutional favoritism to select groups or topics. Once the supreme court found that section 876.18 proscribed fighting words not constitutionally protected, it also had no difficulty in concluding that the statute was not overbroad. The court agreed that when applied to conduct, the overbreadth of a challenged statute must be both real and substantial. Because the conduct prohibited by the statute, the unauthorized placing of flaming crosses on the property of another, was not protected by the First Amendment, it likewise could not be considered unconstitutionally overbroad.[197] Thus, the supreme court upheld the constitutionality of Florida's cross burning law.

196. *Id.* (quoting St.Paul, Minn. Legis. Code § 292.02 (1990)).

197. The Supreme Court of Florida did not directly address the first district's example of how section 876.18 could be used impermissibly to suppress offensive but protected conduct. Instead, the supreme court's opinion merely declared that the threat of impermissible suppression by overbroad application was "speculative at best and is insufficiently substantial to invalidate the statute on its face." *T.B.D.*, 656 So. 2d at 482. Even if one could conceive of isolated instances were section 876.18 could be improperly utilized, this was not enough to find it was substantially overbroad. *Id.*

APPENDIX A: SENTENCING GUIDELINES AND RELATED TOPICS

Cases discussing sentencing guidelines and related topics were a major focus of a significant number of Supreme Court of Florida cases this last survey year. Readers interested in these areas should consult the following recent supreme court decisions as listed below:

A. *Sentencing Guidelines*

1. Collateral Attack on Departure Sentence

Davis v. State, 661 So. 2d 1193 (Fla. 1995).

The court found that an improper departure sentence due to the trial court's failure to timely file written reasons could not be challenged for the first time through collateral attack under Rules 3.800(a) and 3.850 of the *Florida Rules of Criminal Procedure*, as long as the sentence itself was within the maximum period set forth by statute. Such a sentence is not an illegal sentence and thus cannot be considered "fundamental error" which can be raised in collateral proceedings.

2. Scoring of Prior Convictions on Appeal

State v. Peterson, 667 So. 2d 199 (Fla. 1996).

In this decision, the Supreme Court of Florida found that when the defendant is to be sentenced for a subsequent offense, prior convictions on appeal should be included for scoring purposes on a sentencing scoresheet. However, the court noted in dicta that if the prior conviction was reversed after the defendant was sentenced for the subsequent offense, the defendant could file for post-conviction relief. This dicta is consistent with the supreme court's recent decisions regarding the crime of felony possession of a firearm. For a discussion of these cases, see *supra* text accompanying notes 36–54.

3. Scoring of Out-of-State Convictions

Dautel v. State, 658 So. 2d 88 (Fla. 1995).

The court held that only the elements of an out-of-state crime, and not the underlying facts, should be considered in determining what Florida offense the out-of-state conviction is analogous to for purposes of scoring the conviction under the sentencing guidelines.

4. Reasons for Departure

Rahmings v. State, 660 So. 2d 1390 (Fla. 1995).

This case stands for the proposition that a convicted defendant's subsequent failure to appear for sentencing was not a valid reason for departing upward from the sentencing guidelines; however, the court distinguished this decision from its previous decision in Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), where it upheld departure due to the defendant's failure to appear at sentencing. The accused in *Quarter-*

man had agreed, pursuant to a negotiated plea, that such failure would serve as grounds for a departure. There was no such negotiated plea arrangement in *Rahmings*.

State v. Darrisaw, 660 So. 2d 269 (Fla. 1995).

Here, the court found that a convicted felony defendant who was previously convicted of two misdemeanors could not be given a departure sentence based on an escalating pattern of criminal conduct since the offenses, while "escalating" in nature, were not part of a pattern since they were not temporally close or similar in nature.

Jory v. State, 668 So. 2d 195 (Fla. 1996).

The court concluded that the defendant's professed belief that sexual acts with minors were not wrong and that his prosecution was part of a homophobia by the State did not show that the defendant was unamenable to rehabilitation and that he posed a danger to society. Thus, the defendant's statements were inadequate to support an upward departure under the sentencing guidelines.

5. Correct Sentencing Procedure When Probation Cases are Sentenced in Conjunction with a New Substantive Offense

State v. Lamar, 659 So. 2d 262 (Fla. 1995).

The court held that where two offences exist, two sentencing scoresheets should be prepared. The new offense should be listed as the primary offense in one scoresheet and the prior offense in the other. The sentencing court should then use the scoresheet which would result in the more severe sanction.

B. *Sentences for Misdemeanors*

Armstrong v. State, 656 So. 2d 455 (Fla. 1995).

A defendant convicted of multiple misdemeanors can be sentenced to consecutive terms in a county jail even if the cumulative effect of the sentence exceeds one year.

C. *Jury Instructions on Punishment*

Knight v. State, 668 So. 2d 596 (Fla. 1996).

The court held that a defendant accused of a non-capital offense for which a minimum mandatory sentence must be imposed is not entitled to have the jurors instructed as to that minimum mandatory sentence since it is irrelevant to their decision.

D. *Plea Agreements and Sentencing*

1. Departure Sentences Pursuant to Plea Agreements

State v. Williams, 667 So. 2d 191 (Fla. 1996).

This decision provides authority for the proposition that a departure sentence imposed pursuant to a valid plea agreement does not need to be accompanied by written reasons for the departure as long as the sentence does not exceed the statutory maximum and the record reflects the agreement's terms.

2. Withdrawal of Plea Due to Court's Departure from Plea's Terms

Goins v. State, 672 So. 2d 30 (Fla. 1996).

The court found that if there is a firm agreement for a specified sentence, as opposed to an agreement only to recommend a specified sentence, a trial judge's decision to dishonor the agreement gives the defendant the right to withdraw the plea. Furthermore, the defendant does not have to immediately make a motion to do so in order to preserve the issue for appeal.

E. *Habitual Offender Sentences*

1. Habitual Violent Felony Offender

White v. State, 666 So. 2d 895 (Fla. 1996).

Here, the court held that a prior conviction for manslaughter by culpable negligence can serve as a predicate offense for the imposition of a subsequently convicted felon's sentence as a habitual violent felony offender pursuant to FLA. STAT. § 775.084(1)(b)(1) (1995).

See also case cited *infra* Part I.

2. Collateral Attack on Consecutive Habitual Felony Offender Sentences

State v. Callaway, 658 So. 2d 983 (Fla. 1995).

Defendants who received consecutive habitual felony sentences arising out of same criminal episode more than two years prior to the decision in Hale v. State, 630 So. 2d 521 (Fla. 1993), *cert. denied*, 115 U.S. 278 (1994) (declaring such sentences statutorily impermissible). The defendant should be given a two-year time period after *Hale* to move pursuant to Rule 3.850 of the *Florida Rules of Criminal Procedue* for an evidentiary hearing to challenge these convictions.

F. *Control Release*

1. Denial of Control Release Eligibility

Gramegna v. Parole Commission, 666 So. 2d 135 (Fla. 1996).

The court held that an offender convicted of committing a lewd assault upon a child pursuant to section 800.04 of the *Florida Statutes* is automatically, as a matter of law, deemed ineligible by former section 947.146(4)(d) (1991) (which is now codified as section 947.146(3)(c) (1995)) for control release despite the victim's actual consent to the act involved.

2. Evidentiary Basis for Denial of Control Release

See id.

In the *Gramegna* decision, the court also decided, citing section 947.146(3) (1991) of the *Florida Statutes*, that the Control Release Commission can rely on any official document in the court record that was generated during a criminal investigation or proceeding, including an arrest report, which is similar to the present statutory law.

G. *Revocation of Probation*

Credit for Time Previously Served

Shoda v. State, 666 So. 2d 134 (Fla 1996).

When probation is revoked and the accused receives a new community control sentence, credit must be given for time previously spent on probation so that the total period does not exceed the statutory maximum for a particular offense.

Waters v. State, 662 So. 2d 332 (Fla. 1995).

A result similar to that obtained in *Shoda* is required where the new sentence following a probation revocation is a probationary split sentence combination of actual incarceration followed by probation.

H. *Conditions of Probation*

Notice to Defendants of Imposition of Conditions

State v. Hart, 668 So. 2d 589 (Fla. 1996).

The court construed the *Florida Rules of Criminal Procedure* and found that general conditions 1 to 11 contained in the probation form in rule 3.986 are standard conditions of probation which need not be orally announced at sentencing to give adequate notice of such; however any special conditions of probation must be orally pronounced so that the defendant has an opportunity to object to them.

I. *Stacking of Minimum Mandatory Sentences*

Jackson v. State, 659 So. 2d 1060 (Fla. 1995).

This decision held that a defendant could not be sentenced to a minimum mandatory sentence as a habitual offender followed by a firearm usage minimum mandatory sentence for offenses occurring within a single criminal episode.

APPENDIX B: HOMICIDE OFFENSES

A number of Supreme Court of Florida decisions involving homicide offenses are not discussed in this article. Readers interested in supreme court cases discussing whether the state has proven a particular homicide offense may wish to consult the following cases:

A. *First-Degree Murder*

1. Insufficient Evidence of Premeditation

Rogers v. State, 660 So. 2d 237, 241 (Fla. 1995).

Here, the court found that there was insufficient evidence of premeditation where the evidence merely showed that the accused shot the victim during a struggle over a gun as there was no evidence the defendant had ever "formed a conscious purpose to kill"; however, the court found sufficient evidence for a second degree murder conviction. *Id.* (quoting Wilson v. State, 493 So. 2d 1019 (Fla. 1986).

Mungin v. State, 667 So. 2d 751, 754 (Fla. 1995).

The court concluded that there was not sufficient evidence to support a premeditated murder conviction where the evidence of guilt was wholly circumstantial and there was no confession or other evidence to suggest the proof was not "consistent with a killing that occurred on the spur of the moment;" however, the general first degree murder verdict was affirmed on the state's alternative theory of felony murder.

2. Sufficient Evidence of Premeditation

Finney v. State, 660 So. 2d 674 (Fla. 1995), *cert. denied*, 116 S. Ct. 823 (1996).

A defendant's contention that he did not kill a bound and gagged victim who died from multiple stabs wounds was sufficiently inconsistent with the theory that the victim died during consensual erotic sex that a jury could find premeditation.

B. *Instructions on Premeditation*

Kearse v. State, 662 So. 2d 677, 681 (Fla. 1995).

In this decision, the court held that the trial court did not err by adding language to the standard premeditation instruction. The language stated that "[a]mong the ways that premeditation may be inferred is from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted." Apart from the court's use of the word "murder," the remaining language was a correct statement of the law, thus the trial judge could use it since part of a trial judge's responsibility is to accurately and completely charge the jury. The court agreed that the word

"murder" should not have been used but found that the failure to object to this at trial waived this issue for appeal.

C. Felony Murder

Kearse v. State, 662 So. 2d 677 (Fla. 1995).

Kearse also held that an indictment does not need to separately charge felony murder for the prosecution to proceed on both this theory and one of premeditated murder; likewise, the state does not have to give defense notice of the underlying felony that it will use to prove felony murder.